

12 HEARING ON MOTION TO DISMISS CASE  
13 BEFORE THE HONORABLE U.S. DISTRICT JUDGE LAURA TAYLOR SWAIN  
14 UNITED STATES DISTRICT COURT JUDGE

16 APPEARANCES

17 ALL PARTIES APPEARING TELEPHONICALLY

18 For The Commonwealth  
19 of Puerto Rico, et al.: Mr. Martin J. Bienenstock, PHV

20 For Puerto Rico Fiscal  
Agency and Financial  
21 Advisory Authority: Mr. Peter Friedman, PHV

22 For The Retiree  
Committee: Mr. Ian Gershengorn, PHV

23 For The U.S. Department  
24 of Justice: Mr. Bradley Humphreys, PHV

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1 APPEARANCES, Continued:

2 For Ambac Assurance  
3 Corporation: Ms. Elizabeth Prelogar, PHV

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	I N D E X	
		PAGE
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2	WITNESSES:	
3	None.	
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5	EXHIBITS:	
6	None.	
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1 San Juan, Puerto Rico

2 January 12, 2021

3 At or about 9:56 AM

4 \* \* \*

5 THE COURT: Good morning. This is Judge Swain  
6 speaking.

7 MS. NG: Good morning, Judge. It's Lisa. Everybody  
8 is here.

9 THE COURT: Thank you.

10 And, Ms. Tacoronte, would you please call the case?

11 COURTROOM DEPUTY: Yes, Your Honor.

12 The United States District Court for the District of  
13 Puerto Rico is now in session. The Honorable Laura Taylor  
14 Swain presiding.

15 AP case 20-6 --

16 THE COURT: Ms. Tacoronte, I'm having difficulty  
17 hearing you.

18 COURTROOM DEPUTY: I'm sorry, Your Honor. How about  
19 now?

20 THE COURT: That's much better. Thank you.

21 COURTROOM DEPUTY: Sure.

22 AP case --

23 THE COURT: And so are you going to call the caption  
24 of the adversary, also?

25 COURTROOM DEPUTY: Yes, Your Honor.

1                   *In re: The Financial Oversight Board of Puerto Rico,*  
2                   *et al., Case No. 17-3283; AP Case No. 20-68, Ambac Assurance*  
3                   *Corporation versus the Financial Oversight and Management*  
4                   *Board for Puerto Rico, et al.,* for hearing on motion.

5                   THE COURT: Thank you.

6                   And buenos dias. Welcome counsel, parties in  
7                   interest, and members of the public and press. Today's  
8                   hearing is for oral argument on the defendants' Motion to  
9                   Dismiss the Complaint filed in Adversary Proceeding No. 20-68.

10                  To ensure the orderly operation of today's telephonic  
11                  hearing, all parties on the line must mute their phones when  
12                  they are not speaking. If you are accessing these proceedings  
13                  on a computer, please make sure to select "mute" on both the  
14                  Court Solutions dashboard and your phone. When you need to  
15                  speak, you must unmute on both the dashboard and the phone.

16                  I remind everyone that consistent with court and  
17                  judicial conference policies, and the orders that have been  
18                  issued, no recording or retransmission of the hearing is  
19                  permitted by any person, including but not limited to the  
20                  parties, members of the public, and the press. Violations of  
21                  this rule may be punished with sanctions.

22                  I will be calling on each speaker during this hearing  
23                  in the agreed order that is enumerated in the Joint  
24                  Informative Motion filed at Docket Entry No. 58 on the  
25                  adversary proceeding docket on January 8, 2021. When I do,

1    please begin your remarks by identifying yourself by name for  
2    clarity of the record.

3           If you wish to be heard out of order, or otherwise  
4    need to make a remark, please state your name clearly at the  
5    end of an argument segment and request to be heard. Don't  
6    just use the "wave" on the Court Solutions dashboard. Speak,  
7    I will respond to your request, and I will call on each  
8    speaker if more than one person wishes to be heard and I am  
9    granting the request.

10           Please do not interrupt each other or me during this  
11  hearing. If we interrupt each other, it is difficult to  
12  create an accurate transcript of the proceeding. Having said  
13  that, I apologize in advance for breaking this rule, as I may  
14  interrupt if I have questions or if you go beyond your  
15  allotted time. If anyone has difficulty hearing me or another  
16  participant, please say something right away.

17           The time allotments for each speaker and for each  
18  segment of the argument are set forth in the Joint Informative  
19  Motion filed in the adversary proceeding. I encourage each  
20  speaker to keep track of his or her own time. The Court will  
21  also be keeping track of the time and will alert each speaker  
22  when there are two minutes remaining with one buzz, and when  
23  time is up, with two buzzes.

24           Here is an example of the buzz sound.

25           (Sound played.)

1                   THE COURT: If your allocation is two minutes or  
2 less, you will just hear the final two buzzes.

3                   If we need to take a break, I will direct everyone to  
4 disconnect and to dial back in at a specified time. And the  
5 argument is scheduled to run for two hours, that is, from now  
6 until just about noon, Atlantic Standard Time.

7                   And so I will now turn to the arguments on the  
8 motion. First, I have the Oversight Board for 25 minutes.

9                   MR. BIENENSTOCK: Good morning, Judge Swain. My name  
10 is Martin Bienenstock, of the law firm Proskauer Rose, LLP,  
11 and we represent the Oversight Board as Title III  
12 representative of the Commonwealth.

13                   THE COURT: Good morning, Mr. Bienenstock.

14                   MR. BIENENSTOCK: We wish the Court, its staff, and  
15 all parties a happy, healthy new year; swift vaccinations; and  
16 look forward to returning to San Juan.

17                   The relief the Oversight Board seeks this morning is  
18 an order dismissing Ambac's Complaint dated May 26, 2020,  
19 pursuant to the Oversight Board's Motion to Dismiss dated  
20 August 17, 2020. While we believe it is a threshold issue  
21 that Ambac is estopped on multiple grounds from participating  
22 in the Title III cases, accepting a billion dollar recovery,  
23 and three years later contending PROMESA Titles I, II, and III  
24 are unconstitutional, and demanding the Oversight Board and  
25 its members be enjoined from "any further action whatsoever in

1 connection with" those titles of PROMESA, I have to leave that  
2 threshold issue, because my colleague, Peter Friedman of  
3 O'Melveny, will be discussing that.

4 I will argue why the Uniformity Clause does not apply  
5 to PROMESA, and its application to Puerto Rico's minimum of  
6 141 eligible Title III debtors, and why even if it does apply,  
7 based on two United States Supreme Court decisions, all  
8 relevant provisions of PROMESA satisfy the uniformity  
9 requirement.

10 Although the first sentence of Ambac's preliminary  
11 statement provides, "Congress enacted a private bankruptcy  
12 bill for Puerto Rico alone," Ambac shifts gears on page four  
13 of its brief and asserts PROMESA is not a local law, and on  
14 page 21, asserts it is a national law. Before I explain why  
15 Ambac is wrong, I want to point out that by arguing PROMESA is  
16 a national law and not a local law, Ambac effectively admits  
17 the Territories Clause in Article IV, Section 3 of the  
18 Constitution is not for local laws subject to the Bankruptcy  
19 Uniformity Clause in Article I, Section 8, Clause 4 of the  
20 Constitution. There is no other reason to argue the local,  
21 national distinction.

22 The Territories Clause uses the word "all" and is  
23 pretty clear. "Congress shall have power to dispose of and  
24 make all needful rules and regulations respecting the  
25 territory or other property belonging to the United States."

1                   The Bankruptcy Uniformity Clause in Article I,  
2 Section 8, Clause 4 of the Constitution also clearly provides  
3 it applies to the United States, and no one contends Puerto  
4 Rico is a state. It provides, Congress shall have power to  
5 establish "uniform laws on the subject of bankruptcies  
6 throughout the United States."

7 On the national statute issue, Ambac's brief, at  
8 pages 21 through 28, contends Title III is a national statute.  
9 Ambac asserts two tests for whether PROMESA Title III is a  
10 local or national law. At page four of its brief, Ambac  
11 asserts, "no local law could, as PROMESA does, authorize  
12 federal courts to discharge debt held by creditors  
13 nationwide." Ambac's second test, also on page four of its  
14 brief, is whether a state legislature could enact PROMESA  
15 Title III. As I am about to show, the Supreme Court has  
16 expressly ruled to the contrary on both issues.

17 First I'll address the creditor location test. The  
18 Oversight Board responded to these issues on pages 11 to 16 of  
19 its Reply Brief, and I will not rehash what we said. I want  
20 to make just three points now. First, Title III is a local  
21 statute, because it only discharges debt of Puerto Rico  
22 governmental entities. And this Court, in PROMESA Section  
23 306(b), is only granted property jurisdiction over property of  
24 the Puerto Rico Title III debtors.

25 Pursuant to logic and the United States Supreme Court

1      jurisprudence that entities outside Puerto Rico own Puerto  
2      Rico debt does not render Title III a national statute.  
3      Indeed, if Ambac's theory is correct, Title III would be an  
4      international statute, because entities outside the United  
5      States own some of its debt. Moreover, on Ambac's theory,  
6      Title III would bounce back and forth from being a local,  
7      national, and international statute, based on where the debt  
8      trades and resides any given night, even though Title III's  
9      provisions and consequences do not change.

10              Second, Ambac ignores the fundamental basis of  
11      bankruptcy jurisdiction. Title III is also a local statute,  
12      because it operates in rem. The significance of in rem  
13      jurisdiction is that Title III's discharge frees up only  
14      property of Puerto Rico entities and their future earning  
15      power.

16              Third, the Supreme Court ruled in *Central Virginia v. Katz*, 546 U.S. 356, at pages 369 and 70, that, "Bankruptcy  
17      jurisdiction, as understood today and at the time of the  
18      framing, is principally in rem jurisdiction." The Supreme  
19      Court went on to say, in bankruptcy, "the Court's jurisdiction  
20      is premised on the debtor and his estate, and not on the  
21      creditors."

23              In respect of Ambac's contention that the Territories  
24      Clause does not mean what it says, namely, Congress can make  
25      all needful rules and regulations, and only authorizes

1      Congress to enact laws a state can enact, there is no such  
2      rule. The Supreme Court has demonstrated time and again there  
3      is no such rule. And Ambac hasn't shown it would be breached  
4      by PROMESA in any event. To be clear, the Oversight Board's  
5      motion does not require a ruling that there are no constraints  
6      on the Territories Clause legislation, only that the  
7      Uniformity Clause is either not a constraint or is not  
8      violated here.

9                    Empirically, history shows Congress enacted special  
10     debtor-creditor laws for territories. In *Hayman v. Moxley*, at  
11     the Oversight Board's Reply Brief at page ten, the Circuit  
12     Court of Appeals for the District of Columbia enforced an Act  
13     of Congress entitled, An Act for the Relief of Insolvent  
14     Debtors Within the District of Columbia. That law provided  
15     discharges.

16                   Before getting to the Article III example, I will  
17     cover the tax cases, because Ambac supports its local law  
18     argument with a phrase from the *Binns* opinion. Article I,  
19     Section 8, Clause 1 of the Constitution contains a Uniformity  
20     Clause for taxes requiring, "all duties imposed and excises  
21     shall be uniform throughout the United States."

22                   The Supreme Court has at least twice ruled the Tax  
23     Uniformity Clause does not apply to territories: Once in  
24     *Gibbons v. District of Columbia*, where the real property tax  
25     in the District of Columbia was one and a half percent on some

1 property and one and a quarter percent on other property; and  
2 once in *Binns v. United States*, that affirmed a license tax in  
3 the territory of Alaska, which was not imposed on the rest of  
4 the country.

5 The Supreme Court found these cases easy. For  
6 instance, in *Binns*, at page 494, the Court took as a given  
7 that "Congress has undoubtedly the power by direct legislation  
8 to impose these license taxes upon the residents of Alaska,  
9 providing that when collected, they are paid to a treasurer of  
10 the territory."

11 Ambac takes a snippet from *Binns* at page 12 of its  
12 brief, says, quote, Congress and the government of the  
13 territories has plenary power, save as controlled by the  
14 provisions of the Constitution. Ambac asserts that last  
15 phrase, "controlled by the provisions of the Constitution,"  
16 means the Congressional power to legislate for the territory  
17 is controlled by the Uniformity Clause. But *Binns* itself  
18 shows that is not what the Supreme Court was saying.

19 First, the facts in *Binns*, at page 487, show it was a  
20 local statute, even though it applied to persons and  
21 corporations anywhere in the world. The tax required that  
22 any -- that "any person or persons, corporation or company,  
23 prosecuting or attempting to prosecute any of the following  
24 lines of business within the District of Alaska shall first  
25 apply for and obtain license so to do from a district court or

1      a subdivision thereof in said district, and pay for said  
2      license for the respective lines of business and trade as  
3      follows: To-wit, transfer companies, 50 dollars per annum."  
4      I've read it to show the tax applied to any person or  
5      corporation, which would include a person, a corporation  
6      residing anywhere in the United States, or the world.

7              Second, *Binns'* holding refutes Ambac, because its  
8      holding is that Congress can impose license taxes in Alaska  
9      without making them uniform across the United States. Then,  
10     at page 496, *Binns* explains exactly what being subject to the  
11     provisions of the Constitution means. *Binns* rules, "in order  
12     to avoid any misapprehension that we may add -- any  
13     misapprehension, we may add that this opinion must not be  
14     extended to any case, if one should arise, in which it is  
15     apparent that Congress is, by some special system of license  
16     taxes, seeking to obtain from a territory of the United States  
17     revenue for the benefit of the nation, as distinguished from  
18     that necessary for the support of the territorial government."

19              Applying that principle here, if Congress enacted a  
20     statute for Puerto Rico that restructured debt of both Puerto  
21     Rico and non-Puerto Rico entities, the statute would be  
22     subject to the Uniformity Clause, but Congress restricted  
23     PROMESA in all its titles to Puerto Rico.

24              Now for the Article III examples. In short, when  
25     legislating under the Territories Clause, Congress is neither

1     restricted by Article III's requirement of judges having  
2     lifetime tenure and irreducible compensation, nor of the  
3     requirement that admiralty jurisdiction be reserved to the  
4     Federal Courts.

5                     The *American Insurance Company* decision cited in the  
6     Oversight Board's opening and reply briefs provides, at page  
7     546, quote, although admiralty jurisdiction can be exercised  
8     in the states in those courts only which are established in  
9     pursuance of the third Article of the Constitution, the same  
10    limitation does not extend to the territories. In legislating  
11    for them, Congress exercises the combined powers of the  
12    general and of the state government. Thus, Ambac's state  
13    government only rule was disproved 127 years ago. And, Judge,  
14    it gets better with age.

15                     In its seminal *Northern Pipeline* decision, the  
16     Supreme Court quoted and adopted that same language and more.  
17     The Supreme Court, in its *Northern Pipeline* decision, 458 U.S.  
18     50, shows Ambac is wrong in two ways: First, the Supreme  
19     Court comes right out and rules Congress' legislation under  
20     the Territories Clause is an exception to Article III.  
21     Second, the Supreme Court rules Congress' power of government  
22     over the territories is "complete."

23                     Here's what *Northern Pipeline* says at pages 64 and  
24     65. Appellants first rely upon a series of cases in which  
25     this Court has upheld the creation by Congress of non-Article

1      III territorial courts. This exception from the general  
2      prescription of Article III dates from the earliest days of  
3      the Republic when it was perceived that the framers intended  
4      that, as to certain geographical areas in which no state  
5      operated as sovereign, Congress was to exercise the general  
6      powers of government.

7              For example, in *American Insurance Company v. Canter*,  
8      the Court observed that Article IV bestowed upon Congress  
9      alone a complete power of government over territories not  
10     within the states that constituted the United States. The  
11     Court then acknowledged Congress' authority to create courts  
12     for those territories that were not in conformity with Article  
13     III. Such courts were -- and then skipping a few lines, the  
14     *Northern Pipeline* decision says, although admiralty  
15     jurisdiction can be exercised in the states in those courts  
16     only which are established in pursuance of the third Article  
17     of the Constitution, the same limitation does not extend to  
18     the territories. In legislating for them, Congress exercises  
19     the combined powers of the general and of the state  
20     government.

21              The Court followed the same reasoning when it  
22     reviewed Congress' creation of non-Article III courts in the  
23     District of Columbia. It noted that there was in the district  
24     no division of powers between the general and state  
25     governments. Congress has the entire control over the

1      district for every purpose of government, and it is reasonable  
2      to suppose that, in organizing a judicial department here, all  
3      judicial power necessary for the purposes of government would  
4      be vested in the courts of justice.

5              Although *Northern Pipeline* was a plurality holding,  
6      *American Insurance* was a majority and had no dissent.  
7      Additionally, the Supreme Court has approved *Northern*  
8      *Pipeline*, and has followed its holding several times, for  
9      instance, in *Stern v. Marshall*, 564 U.S. 462, at pages 484,  
10     487, 493, 494 and 495.

11              Finally, nowhere does Ambac explain why this Court  
12     should assume the framers of the Constitution were so  
13     narrow-minded that they assumed a United States bankruptcy law  
14     could apply to every property law and debtor-creditor regimen  
15     anywhere the United States might acquire a territory in the  
16     rest of the world. For instance, in Canada and other  
17     jurisdictions, they have a debtor-creditor concept called a  
18     floating charge. It's not easy to categorize it as a secured  
19     claim or unsecured claim. The U.S. Bankruptcy Code imposes  
20     interest requirements. Some parts of the world do not allow  
21     interest. And so on.

22              While the Oversight Board submits that even if there  
23     is a uniformity requirement, Title III does not need to be  
24     uniform with Chapter Nine, it is anyway, because the Supreme  
25     Court's *Blanchette* decision shows the existence of an

1      authority that formulates and even makes determinations about  
2      the reorganization plan, does not render a bankruptcy regime  
3      nonuniform from regimes not having such an authority.

4              In short, Ambac's arguments that Title III is  
5      nonuniform with Chapters 9 and 11 are soundly refuted by the  
6      Supreme Court decisions Ambac cites. First, history and logic  
7      have a lot to say here. Since Congress enacted its first  
8      bankruptcy legislation in 1800, Congress has enacted different  
9      bankruptcy laws for individuals liquidating their assets,  
10     individuals with regular income desiring a payment plan,  
11     individuals and entities desiring to reorganize, farmers,  
12     railroads, single asset debtors, small businesses,  
13     municipalities, commodity brokers, stockbrokers, clearing  
14     banks, and debtors subject to foreign proceedings.

15              All those different regimens are in Title 11 of the  
16     United States Code, and broker dealers are eligible for  
17     bankruptcy under the Securities Investor Protection Act of  
18     1970. It cannot be that a bankruptcy regimen for a territory  
19     and its instrumentalities must be uniform with all those  
20     regimens, and if it must be uniform, which regimen must it be  
21     uniform with. It can't be uniform with all of them.

22              Ambac takes Chapter Nine as the standard, and that  
23     has initial and superficial appeal, because Chapter Nine is  
24     for governmental units, albeit not territories. But its  
25     appeal is only superficial, because Chapter Nine was

1      constructed to avoid violating the 10th Amendment. That is  
2      why there is no provision for an oversight board or trustee.

3              Precisely because territories are not within the 10th  
4      Amendment, PROMESA imposes an oversight board with numerous  
5      powers incompatible with the Tenth Amendment. Thus, Ambac's  
6      position defies the Supreme Court's teaching in *Blanchette*  
7      that, quote -- this is 419 U.S., at 159 -- the uniformity  
8      provision does not deny Congress power to take into account  
9      differences that exist between different parts of the country,  
10     when -- to fashion legislation to resolve geographically  
11     isolated problems. We, therefore, agree with the special  
12     court that the Uniformity Clause was not intended to hobble  
13     Congress by forcing it into nationwide enactments to deal with  
14     conditions calling for remedy only in certain regions.

15              Ambac does not recognize Congress' power to deal with  
16     special and unique problems, rather, it rides two horses: On  
17     one horse, it tries mightily to shoehorn Puerto Rico, with its  
18     141 eligible governmental debtors, into the *Gibbons* case,  
19     striking down a private bankruptcy bill for one debtor and one  
20     court. On the other horse, Ambac packs its contentions about  
21     lack of uniformity, which generally fall into two batches. In  
22     one batch, Ambac complains about provisions it contends allow  
23     the Oversight Board -- or cause the Oversight Board to believe  
24     it can pick winners and losers. In the second batch, Ambac  
25     points to a Title III provision providing the Oversight Board

1      the power to limit the amount of debt issued under a Title III  
2      plan of adjustment by its debt sustainability analysis in its  
3      certified fiscal plan, although the Court is not required to  
4      confirm any plan the Oversight Board proposes.

5              As far as there being nonuniform provisions allowing  
6      the Oversight Board to pick winners and losers, PROMESA  
7      Section 301(a) shows indisputably that the same unfair  
8      discrimination provision in Chapters 9 and 11 is in Title III,  
9      along with a host of other identical provisions.

10              I want to focus on Ambac's contention that PROMESA  
11      Section 314(b) (7) renders Title III nonuniform with Chapters 9  
12      and 11. It provides as conditions confirmation that, "the  
13      plan is consistent with the applicable fiscal plan certified  
14      by the Oversight Board under Title II."

15              Ambac's contention is demonstrably wrong. Ambac  
16      doesn't mention that the Supreme Court has already rejected  
17      such an argument in the context of one of its main  
18      authorities, *Blanchette v. Connecticut General Insurance*  
19      *Corporations*, 419 U.S. 102, at page 163. There, Justice  
20      Douglas in dissent argued Ambac's argument. Justice Douglas  
21      argued that, because Section 77 reorganization's required  
22      under Section 77(d), the Interstate Commerce Commission  
23      define the plan as fair and equitable before it can be  
24      confirmed, but the Rail Act did not require the Interstate  
25      Commerce Commission -- I'm sorry. That the Rail Act did not

1      require the Interstate Commerce Commission to make such  
2      finding. The Rail Act provisions for railroads in the Midwest  
3      were not uniform with Section 77 Railroad Reorganization  
4      provisions.

5              The ICC had more power than the Oversight Board in  
6      that its word was final on valuation and many other fact  
7      issues. Parenthetically, in response to Ambac's complaint  
8      that the Oversight Board represents each Title III debtor even  
9      when they have claims against one another, the ICC controlled  
10     in Section 77 reorganization plans of every railroad, whether  
11     competitors or not. Section 77(b) provided, "no plan shall be  
12     approved or confirmed by the judge in any proceeding under  
13     this section unless the plan shall first have been approved by  
14     the commission and certified to the Court."

15              Justice Douglas' dissent in *Blanchette* also cites  
16     *Ecker v. Western P.R. Corp.*, 318 U.S. 448, and specifically  
17     pages 472 to 476, which shows how many more powers the  
18     Interstate Commerce Commission had over Section 77 railroad  
19     reorganizations than the Oversight Board has over a Title III  
20     plan of adjustment. But the Supreme Court rejected the  
21     contention that these powers that the ICC had over the Court  
22     rendered Section 77 nonuniform to the Rail Act. The ICC not  
23     only had to approve the plan, it also made key unreviewable  
24     findings about it. The ICC determined valuation, which  
25     directly controlled which of the creditor's claims and

1 shareholder's interests could participate in the  
2 reorganization value.

3 *Ecker* ruled, quote, the power of the Court does not  
4 extend to participation in all responsibilities of the  
5 commission. Valuation is a function limited to the  
6 Commission, without the necessity of approval by the Court.  
7 The first sentence of the last paragraph of (e) provides, if  
8 it shall be necessary to determine the value of any property  
9 for any purpose under this section, the Commission shall  
10 determine such value and certify the same to the Court in its  
11 report on the plan.

12 The *Ecker* Court goes on to talk about the ICC's power  
13 over the public interest, determining whether the plan was in  
14 the public interest, the formulation of the classification,  
15 and other key issues to any reorganization plan. The Court in  
16 *Ecker* said leaving the problems of public interest to the  
17 Commission was not a departure from precedent. The phrase had  
18 been employed long before in the grant of authority to  
19 supervise the issue of securities.

20 The Court went on to say, the development of the  
21 capitalization of the reorganized company, which is entrusted  
22 solely to the Commission under the requirement that the plan  
23 be compatible with the public interest, is that relating to  
24 the total amount of issuable securities and the quality of the  
25 securities to be issued. So long as legal standard is

1 || followed --

2 || (Sound played.)

5 Ambac's shoehorning into Gibbons just doesn't work.

6 Puerto Rico is not one debtor. It's 63 initially covered  
7 entities, plus 78 municipalities, for 141. Currently, there  
8 are six Title III cases pending. They could not be more  
9 different: Different creditors, different issues, different  
10 governmental functions, different outcomes, COFINA,  
11 Commonwealth, PREPA, HTA. Your Honor understands.

12 THE COURT: Yes.

13 MR. BIENENSTOCK: Ambac's position destroys the  
14 policies to be served by Title III by defying the Supreme  
15 Court's teaching that Congress can address geographically  
16 unique problems. As this Court knows, PROMESA is strong  
17 medicine. It causes Congress to create an Oversight Board  
18 with lots of powers over the territorial government. The  
19 Commonwealth Government's strong opposition to those powers  
20 has punctuated plenty of litigation in this Court.

21                   While Ambac attempts to show the Virgin Islands was  
22 over leveraged and shut out of the debt markets, Ambac hasn't  
23 alleged and provided a scintilla of evidence showing the  
24 Virgin Islands want that medicine or have asked for it. That  
25 is critical for a very important reason. The lesson here is

1 that the appointment of an oversight board is what prevents  
2 Title III from being a moral hazard in which governments run  
3 up debt out of control on the theory they can discharge it in  
4 Title III. The loss of important governmental and political  
5 powers to an oversight board is what deters territory  
6 governments from both irresponsibly incurring debt and failing  
7 to try to deal with their own debt by imposing measures to  
8 restore fiscal responsibility. Ambac's position, however,  
9 destroys all that.

10 According to Ambac, Title III either needs to  
11 eliminate the Oversight Board to make it uniform, or all  
12 territories need the appointment of an oversight board  
13 immediately. Ambac's first alternative eliminates --

14 (Sound played.)

15 MR. BIENENSTOCK: May I just finish the sentence,  
16 Your Honor?

17 THE COURT: Yes, you may.

18 MR. BIENENSTOCK: Thanks.

19 Ambac's first alternative eliminates the only  
20 component of PROMESA designed to restore fiscal responsibility  
21 and market access, while Ambac's second alternative  
22 indiscriminately usurps local government power from all  
23 territories that have been fiscally responsible.

24 THE COURT: Thank you, Mr. Bienenstock.

25 MR. BIENENSTOCK: Your Honor, subject to the Court's

1       questions, I would end here, subject to the rebuttal time.

2                   THE COURT: Yes. Thank you. You've been quite  
3 comprehensive in your remarks, and so I don't have questions  
4 for you at this point.

5                   We will turn to AAFAF, which has been allotted six  
6 minutes.

7                   MR. FRIEDMAN: Good morning, Your Honor. Happy new  
8 year. Peter Friedman of O'Melveny & Myers. I'm going to  
9 discuss estoppel and laches.

10                  So I think one of the keys to understand -- if you  
11 look at Ambac's Complaint, which makes clear that it's about  
12 the statute as written, not about as applied, if you look at  
13 the chart in their Complaint on page 47, every single  
14 allegation and provision of PROMESA that they allege is  
15 nonuniform is clearly identified and is knowable. And if you  
16 look at its Complaint at paragraphs 68 to 73, in their own  
17 words they say the differences have affected the entire Title  
18 III case.

19                  So they knew about this years ago. And they knew  
20 when they talk about various issues, like the Commonwealth and  
21 the Oversight Board's refusal to pay special revenues over to  
22 them, which has been clear from the very beginning of the  
23 case. And they knew, when they talk about fiscal plans, which  
24 were promulgated even -- that had no room for debt service,  
25 which were promulgated even before the Title III case was

1      initiated. They knew, and that knowledge is one of three  
2      interlocking strands joined together to bar the Complaint,  
3      because knowledge we understand is the benefit they received.  
4      And together, those three aggregate to constitutional  
5      estoppel, judicial estoppel, and the application of laches.

6              With respect to constitutional estoppel, this  
7      Complaint came three years into the Title III cases. And  
8      we've cited numerous cases that say when you receive a benefit  
9      under a statute, you cannot subsequently turn around and  
10     challenge the constitutionality of that statute. And Ambac's  
11     response boils down to, well, we didn't really receive a  
12     benefit in respect to COFINA, because we just participated.  
13     But that's not true, and we know it's not true for several  
14     reasons.

15              We know it's not true, as we pointed out, because the  
16     Confirmation Order says that Ambac and other parties received  
17     special fees on account of their efforts in assisting with the  
18     formulation of the COFINA Plan. We know that Ambac touted the  
19     COFINA Plan in connection with various public statements its  
20     made. We know because Ambac signed the PSA. And in Sections  
21     4.6(c) and (f), Ambac didn't just simply sit by passively with  
22     the PSA, but it agreed to support the COFINA Plan, to support  
23     the COFINA Disclosure Statement, and even in 4.6(f), it agreed  
24     to support the Commonwealth-COFINA settlement in the  
25     Commonwealth Title III case.

1                   To put it -- to be any plainer, they  
2 received substantial benefits, and they are nothing like the  
3 school child who had to pay an extra fee in the *Kadrmas* case  
4 to ride across in a bus, across the tundras of North Dakota to  
5 get to school. That is not Ambac, and that's a completely  
6 different situation.

7                   The *Kadrmas* case, which they cite to say means that  
8 if you just sit by and do the bare necessities, you can't be  
9 constitutionally estopped, there is no resemblance to this  
10 situation. And neither did the *Abie* case which they cite to  
11 say that they didn't receive a meaningful benefit, because  
12 there is somebody waiting for years to bring suit. And of  
13 course the difference they overlook in the *Abie* case is that  
14 the *Abie* plaintiff lost immediately when they tried to  
15 challenge the statute, and that the Court held it wasn't  
16 constitutionally estopped was a subsequent challenge many  
17 years later.

18                   With respect to judicial estoppel, it's good to  
19 remember just about exactly two years ago today when we were  
20 all in person, Ambac came to the Court and said that the Court  
21 could pass on a COFINA new bond legislation precisely because  
22 PROMESA was different than Chapter Nine.

23                   (Sound played.)

24                   MR. FRIEDMAN: That argument helped fill a void that  
25 -- the Court had pointed out that it wasn't clear it had the

1      authority to do certain things. Ambac stepped into that void  
2      to say the differences between the two statutes were important  
3      and meaningful, and I think the Court relied on that. And  
4      it's precisely the kind of fast and loose behavior that we see  
5      applications estopped.

6              With respect to laches, again, we know this case has  
7      gone on for more than three years. We know that rights have  
8      been determined, contracts have been rejected, hundreds of  
9      millions of dollars have been spent, and Ambac didn't bring  
10     its facial challenge to this statute. And Ambac's response  
11    is, well, we were trying to work things out or consensually  
12    negotiate and, therefore, we weren't obligated to bring suit  
13    immediately.

14              Your Honor, the ECF is littered with receipts that  
15    just demolish that argument. Ambac has relentlessly pursued  
16    lawsuits arguing the unfit constitutionality of various  
17    behaviors by the Commonwealth and AAFAF. So it's just simply  
18    not credible to argue that they were sitting and trying to  
19    resolve things consensually while, at the same time, pursuing  
20    suits arguing a whole variety of constitutional infirmities in  
21    the Title III cases and fiscal plans.

22              Your Honor, the last issue I want to address is the  
23    issue of whether you can grant -- well, you can hold laches is  
24    inapplicable as a defense to prospective relief. And what I  
25    would say is that it fails at the inception. This isn't

1 prospective relief. This would destroy an ongoing project.  
2 As I said, there are contracts that have been rejected; rights  
3 have been determined; funds have already been expended. Cases  
4 would potentially have to be dismissed if the Court were to  
5 enter the relief. Not even potentially. Would undoubtedly  
6 have to be granted. A motion to dismiss the case would  
7 undoubtedly have to be granted if this Ambac request is  
8 granted.

9 (Sound played.)

10 MR. FRIEDMAN: And that's not simply prospective  
11 relief.

12 Unless the Court has any questions, I reserve the  
13 remainder of my time for rebuttal, Your Honor.

14 THE COURT: Thank you, Mr. Friedman.

15 Next I have the Retiree Committee for three minutes.

16 MR. GERSHENGORN: Thank you, Your Honor. May it  
17 please the Court, Ian Gershengorn from Jenner & Block.

18 I want to make three principal points in my time this  
19 morning. First, the uniformity provision of the Bankruptcy  
20 Clause in Article I does not apply when Congress enacts a  
21 local, debt-related law under Article IV. Mr. Bienenstock  
22 made the textual points, and I won't repeat them, but I want  
23 to add that the textual reading makes good sense.

24 Article I contains careful limits on Congressional  
25 power, because sovereign states demanded uniform treatment in

1 return for relinquishing their sovereignty to the Federal  
2 Government. By contrast, the Territories Clause is an  
3 expressed disuniformity provision. Article IV allows Congress  
4 to make all needful rules and regulations for the territories,  
5 and to act in ways, as the Supreme Court has said, that would  
6 exceed its powers or at least be very unusual in other  
7 contexts.

8 Ambac says that this Court should ignore all this and  
9 apply a functional analysis, but it's the text that governs.  
10 And as a textual matter, any uniformity requirement is a limit  
11 on Congress' Article I power, not its Article IV powers.  
12 Regardless, Ambac gets the functionality analysis wrong,  
13 because it ignores the function of Article IV.

14                   The framers gave Congress a broad latitude --  
15                   (Sound played.)

16 MR. GERSHENGORN: -- to develop innovative approaches  
17 to territorial government, consistent with the need for  
18 inventive statesmanship in the territories. It, thus, would  
19 be wrong as a functional matter to apply a uniformity  
20 straitjacket to local territorial legislation.

21 My second point this morning is that this is local  
22 legislation. How do you know that? The Supreme Court in  
23 *Aurelius* said so. The Court said Congress exercised its power  
24 under Article IV to, quote, make local, debt-related law, and  
25 that PROMESA creates a process for determining, quote, certain

1 local policies related to local fiscal responsibility in  
2 respect to local matters.

3 Ambac makes two principal counter arguments: First,  
4 it argues that PROMESA can't be local, because it supposedly  
5 has nationwide effect, but that's the precise argument that  
6 *Aurelius* made and the Supreme Court rejected. Second, Ambac  
7 argues that PROMESA is not local, because a local legislature  
8 could not have passed it, but no case requires that Congress'  
9 Article IV power be viewed through the prism of what a  
10 hypothetical local legislature could or could not do.

11 When Congress acts in the territories, Congress has,  
12 quote, full and complete legislative authority over the people  
13 of the territory. The right question under *Binns* is not what  
14 a local legislature could do, but rather whether Congress  
15 acted to benefit a territory, rather than the nation.

16 Finally, Your Honor, I want to just say a word about  
17 why PROMESA is constitutional, even if the Uniformity Clause  
18 applies. Ambac relies on *Gibbons*, but the bottom line is that  
19 Puerto Rico is fundamentally different from a single railroad.  
20 It's a sovereign government, not a private corporation. And  
21 it has a responsibility for providing essential government  
22 services to three million people, and those services were at  
23 risk.

24 In *Blanchette*, the Supreme Court said the Uniformity  
25 Clause was not intended to hobble Congress by forcing it into

1 nationwide enactments to deal with conditions calling for a  
2 remedy only in certain regions. If *Blanchette* means anything  
3 at all, it means that Congress can pass PROMESA to address the  
4 fiscal sovereignty of Puerto Rico and to protect the health of  
5 its residents.

6 (Sound played.)

7 MR. GERSHENGORN: If the Court has no questions, I'll  
8 save the remainder of the time for rebuttal.

9 THE COURT: Thank you, Mr. Gershengorn.

10                   And now, for the United States, I have an allocation  
11 of eight minutes.

14 MR. HUMPHREYS: I apologize. It's my first time,  
15 Your Honor. I'm now unmuted on both.

16 THE COURT: Thank you.

17 MR. HUMPHREYS: Good morning, Your Honor.

18 THE COURT: Good morning, Mr. Humphreys.

19 MR. HUMPHREYS: Happy new year. Thank you.

20 THE COURT: Happy new year.

21 MR. HUMPHREYS: Brad Humphreys of the United States  
22 Department of Justice on behalf of the United States.

23 The question of whether PROMESA violates the  
24 uniformity provision in Article I, Section 8, does not present  
25 a closed question, and accepting Ambac's arguments would

1 require the Court to disregard decades of precedent  
2 interpreting Article I's uniformity provisions. As the Court  
3 is well aware, Congress enacted PROMESA pursuant to its  
4 authority in Article IV, which authorizes Congress to make all  
5 needful rules and regulations respecting a territory.

6 As the Supreme Court recently reiterated in *Aurelius*,  
7 Article IV gives Congress the power to legislate for the  
8 territories in ways that it would not be able to, or at least  
9 would be very unusual in other contexts. And similarly, as  
10 Mr. Gershengorn just pointed out, the Supreme Court has said  
11 that Article IV gives Congress broad latitude to develop  
12 innovative approaches to territorial governments. And that's  
13 from the Supreme Court's decision in *Puerto Rico v. Sanchez*  
14 *Valle*.

15 In PROMESA, Congress looked to the unique  
16 circumstances facing the people and Government of Puerto Rico  
17 caused by the debt crisis in 2016, and developed a local,  
18 debt-related law based on those particular circumstances.  
19 Ambac, of course, claims that Congress was limited by the  
20 uniformity requirement in Article I, Section 8, of the  
21 Bankruptcy Clause specifically; but as the government  
22 explained in its briefs, that limitation applies only when  
23 Congress exercises its Article I enumerated powers, not when  
24 it's legislating for territories under Article IV. And Ambac  
25 lacks a convincing argument why a limitation on Congress'

1      Article I powers would apply when it's actually exercising its  
2      Article IV authority as local, debt-related law, as the Court  
3      recognized in *Aurelius*, particularly in light of the Supreme  
4      Court's decision in *Binns*, which Mr. Bienenstock discussed at  
5      length.

6              That a uniformity requirement does not apply is also  
7      clear from the specific language of the provision, which  
8      requires uniformity only throughout the United States. That  
9      limitation has been interpreted, with respect to the taxation  
10     uniformity requirement, to exclude Puerto Rico explicitly.  
11     Moreover, accepting Ambac's contrary argument would create  
12     significant tension with the Supreme Court's decision in  
13     *Puerto Rico v. Franklin California Tax-Free Trust*, which held  
14     that Puerto Rico is not a state for the purposes of the  
15     Bankruptcy Code's gateway provision, and that Puerto Rico's  
16     municipalities, therefore, could not avail themselves of the  
17     Chapter Nine reorganization.

18              If the uniformity requirement, in fact, applied to  
19     Puerto Rico, then there could potentially be a conflict and  
20     create a uniformity issue in the Bankruptcy Code itself,  
21     potentially going back to the 1930s. And nothing in the  
22     *Franklin* case suggests, however, that there is such a problem.  
23     It's simply implausible, in light of *Franklin*, to believe that  
24     Congress has treated Puerto Rico differently for many decades  
25     if the uniformity requirement is as stringent as Ambac

1 asserts.

2 I'd also note that the Supreme Court cited the  
3 uniformity requirement when deciding *Franklin*, and there was a  
4 concurrence addressing the issue at length in the Circuit  
5 Court decision. So it's not as if the Supreme Court were not  
6 aware of the Article I, Section 8, requirement when it decided  
7 the case.

8 Applying the uniformity requirement and the  
9 Bankruptcy Clause to Puerto Rico would also be inconsistent  
10 with how courts have interpreted other uniformity requirements  
11 in Article I. The courts have long interpreted the uniformity  
12 requirement for naturalization, which is contained in the same  
13 sentence of Article I, Section 8, to allow Congress to set  
14 different rules among the territories. Specifically, I'd  
15 point the Court to the Ninth Circuit's decision in *Eche*, where  
16 the Court concluded that the uniformity requirement did not  
17 prevent Congress from treating differently citizens from the  
18 Commonwealth, the Northern Mariana islands. And, of course,  
19 Congress has long set different rules for naturalization of  
20 residents in different territories, as we discussed in our  
21 brief.

22 Furthermore, as to the Taxation Clause in Article I,  
23 Section 8, which also includes a uniformity requirement, the  
24 Court in *Binns*, of course, upheld taxes that applied only to  
25 the *Binns'* -- territory of Alaska. It's also telling that

1 residents of Puerto Rico at present are taxed differently in  
2 some ways than residents in the 50 states, in a way that is  
3 beneficial to residents of Puerto Rico. And those differences  
4 could arguably be unlawful if the uniformity requirements for  
5 taxation in Article I, Section 8, were as stringent as Ambac  
6 claims.

7 Ambac asks the Court to ignore all of this, the  
8 structure, text, other cases interpreting uniformity  
9 requirements, and to conduct a so-called functional analysis  
10 to decide whether the uniformity requirement and the  
11 Bankruptcy Clause applies to the territories. However, the  
12 Supreme Court in *Blanchette* and *Ptasynski* has instructed that  
13 the Uniformity Clause should be interpreted consistently with  
14 each other. So the Court should not simply ignore those cases  
15 in the context of taxation and naturalization in favor of a  
16 free-floating outcome driven test like Ambac advances.

17 Indeed, the government submits that it would defy  
18 core principles of interpretation to say that uniformity in  
19 one clause means something completely different when used in a  
20 different clause in the same section. Because the Bankruptcy  
21 Clause's uniformity provision does not apply, Ambac's  
22 challenge to PROMESA fails.

23 However, even if the Court could get past that  
24 threshold issue, which we don't think is possible, PROMESA  
25 would still be constitutional if the uniformity requirement

1      were to apply. That requirement in the Bankruptcy Clause is  
2      inherently flexible and allows Congress to pass legislation to  
3      solve geographically isolated problems.

4              Indeed, the Supreme Court has invalidated a law as  
5      inconsistent with the Bankruptcy Clause only once, in *Gibbons*,  
6      where it concluded that Congress had --

7              (Sound played.)

8              MR. HUMPHREYS: -- effectively created a private  
9      bankruptcy law. Even in *Gibbons*, however, the Court  
10     emphasized that the uniformity requirement is not a  
11     straitjacket that forbids Congress from distinguishing among  
12     classes of debtors.

13              And, of course, the Supreme Court upheld the  
14     bankruptcy statute that was limited to a specific region in  
15     *Blanchette*, explaining that the uniformity provision does not  
16     deny Congress to take into account differences that exist in  
17     different parts of the country, and to fashion legislation to  
18     solve geographically isolated problems. There can be no  
19     serious question that that's exactly what Congress did in  
20     PROMESA.

21              In 2016, Puerto Rico faced a crushing public debt  
22     crisis, and had lost access to credit markets, and it had lost  
23     the ability to provide its citizens with effective services.  
24     In other words, the evil to be remedied, the statute, was  
25     Puerto Rico's local public debt crisis. So it was within

1      Congress' power to design a solution to address that problem  
2      without violating the Uniformity Clause, and the Court need  
3      only look to *Blanchette*.

4              And as the Supreme Court indicated in *Ptasynski*, even  
5      where Congress has drawn distinctions based on geography,  
6      courts should be reluctant to disturb Congress' judgment with  
7      respect to enormously complex problems just like this.

8              If the Court has no further questions, I will  
9      conclude my remarks.

10             THE COURT: Thank you, Mr. Humphreys.

11             MR. HUMPHREYS: Thank you, Your Honor.

12             THE COURT: I now have an allocation of 60 minutes  
13      for argument on behalf of Ambac. Who is speaking first?

14             MS. PRELOGAR: Yes. Good morning, Your Honor. This  
15      is Elizabeth Prelogar from Cooley representing Ambac.

16             THE COURT: Good morning, Ms. Prelogar.

17             MS. PRELOGAR: Your Honor, good morning.

18             This case raises a critically important question  
19      under the Constitution of whether Congress may permissibly  
20      single out one territory, Puerto Rico, and create for it a  
21      unique bankruptcy process that differs from all other debt  
22      restructuring proceedings, whether compared to other  
23      territories, compared to other governmental entities, or  
24      compared to any other conceivable class of debtors. PROMESA  
25      violates the bankruptcy uniformity requirement and the

1      Constitution, and the Motion to Dismiss should be denied.

2           The parties on the other side have made a number of  
3      claims in defense of PROMESA, both at the hearing today and in  
4      their briefs, that really fall into four main categories:  
5      About whether the bankruptcy uniformity requirement applies in  
6      the territory; whether PROMESA can qualify as a uniform law;  
7      whether the constitutional violation here could be fixed by  
8      extending PROMESA; and then a number of procedural objections.  
9      And I want to make sure to respond to each of those issues,  
10     but I'll take them in order and begin with the threshold  
11     question of whether PROMESA is subject to the uniformity  
12     requirement in the first place.

13           The Oversight Board's theory here is that because  
14     Congress invoked its Article IV powers when it enacted  
15     PROMESA, all other constitutional constraints and limitations  
16     on Congress' authority are inapplicable. Essentially, this is  
17     an argument that the Constitution just doesn't apply when  
18     Congress takes action related to the territories, and that  
19     categorical claim is inconsistent with precedent. Most  
20     notably --

21           THE COURT: Ms. Prelogar, there's maybe a bit of an  
22     overstatement. They're saying that the Constitution applies.  
23     They're citing Article IV of the Constitution, but they're  
24     saying that Article I does not govern Article IV.

25           So I realize that one has to be aggressive in one's

1 argument, but please be as precise as you can be.

2 MS. PRELOGAR: Absolutely, Your Honor. And it's  
3 absolutely the case that they've argued that, when Congress  
4 here relies on Article IV, that's the source of authority; but  
5 the important thing to recognize is that would effectively  
6 make the invocation of Article IV authority an on-off switch  
7 for any other restrictions in the Constitution. But so long  
8 as Congress is taking action related to the territories, so  
9 long as it's making needful rules and regulations with respect  
10 to the territories, it's not necessary to look at other  
11 constraints in the Constitution. And we think that that's at  
12 odds with Supreme Court precedent.

13 Most notably and most recently, it conflicts with the  
14 Supreme Court's decision just last term in the *Aurelius* case  
15 -- of course, Your Honor's familiar with that -- involving  
16 PROMESA itself and the Appointments Clause challenge. And I  
17 do want to pause on *Aurelius* for a minute and walk through it,  
18 because I think that it refutes the suggestion that the  
19 Oversight Board has made here that any law enacted pursuant to  
20 Article IV qualifies as a local law.

21 So the Oversight Board has made clear in its Reply  
22 Brief that it's using these terms, local law, national law, to  
23 refer to Article IV exercises of authority, which is Article  
24 I. And the Oversight Board has contended that so long as it's  
25 an Article IV statute, or that was the source of authority

1      that Congress invoked, automatically it qualifies as a local  
2      law. But if that were right -- the Supreme Court of course  
3      recognized in *Aurelius* that Congress had invoked Article IV to  
4      pass PROMESA, and that could have been the end of the Court's  
5      analysis. In the Oversight Board's view, the Court could have  
6      just stopped there and said, okay, it's an Article IV statute;  
7      therefore, it's a local law, and it's not necessary to  
8      consider then whether the Appointments Clause would operate as  
9      some kind of restriction or restraint on what Congress has  
10     done. But that's not what the Supreme Court did.

11           The Court went on to consider the purpose of the  
12     Appointments Clause and emphasize that that purpose is to  
13     ensure political accountability, and ran through the text and  
14     the history of the clause. And it was specifically noted that  
15     many times Congress had complied with the Appointments Clause  
16     in appointing officers of the United States who were  
17     exercising power in the territory.

18           So, ultimately, the Court in *Aurelius* concluded that  
19     Congress can be bound by the Appointments Clause when it  
20     creates officers of the United States, even if it's acting  
21     pursuant to Article IV, and even if those officers are  
22     exercising power in or in relation to the territories.

23           Now, Mr. Gershengorn this morning and the parties  
24     generally have emphasized the second holding in *Aurelius*.  
25     This was the holding, of course, that the Board members are

1 local officers. But there the Supreme Court was considering  
2 the classification of the Board members themselves. It wasn't  
3 considering the classification of PROMESA. And the holding  
4 with respect to the Oversight Board members turned on the fact  
5 that they were exercising primarily local duties in these  
6 proceedings. In fact, the Court emphasized that the Oversight  
7 Board members were, effectively, like any state or local  
8 officials, to supervise bankruptcy proceedings under Chapter  
9 Nine.

10 That doesn't mean that PROMESA is a local law any  
11 more than Chapter Nine would be a local law just because state  
12 and local officers supervise the bankruptcy proceedings on  
13 behalf of the debtor. So we do think that *Aurelius* itself  
14 forecloses this idea that PROMESA automatically qualifies as a  
15 local law just because of the invocation of Article IV  
16 authority, or just because of the fact that Congress is taking  
17 action that's related to a territory.

18 The central precedent that the Oversight Board has  
19 relied on, and it's come up in several of the presentations  
20 this morning, is *Binns versus United States*. But we actually  
21 think that this proves the point and shows the distinction  
22 between what truly qualifies as a local law passed by Congress  
23 with respect to a territory, that is, Congress stepping into  
24 the shoes of what a state legislature could do, versus  
25 Congress having to rely on its unique federal authority in

1      order to pass a statute.

2            And so maybe I could just walk through the facts of  
3      *Binns* for a moment. *Binns* involved a tax for Alaska when  
4      Alaska was still a territory. At that point, Alaska didn't  
5      have its own legislature, and so there was no other entity  
6      that could have passed any kind of tax to pay for territorial  
7      government. What the Supreme Court said is that Congress has  
8      the power to levy taxes, and here I'm going to quote, in like  
9      manner, as the legislature of a state may tax the people of a  
10     state for state purposes.

11           This is the kind of reasoning the Court has  
12     frequently employed in this context. *Cincinnati Soap* is  
13     another example, where the Court said Congress has, quote,  
14     equivalent power of a state in comparable circumstances. And,  
15     again, this is based on the practical consideration that there  
16     might not be another entity that's available to create the  
17     structures of local government for a territory to pass local  
18     legislation, particularly if, as in Alaska, there was no  
19     territorial legislature, and so an exercise in this local  
20     authority.

21           And this explains the language about Congress being  
22     able to act in ways that are unusual. The Court has  
23     emphasized that Congress can essentially act as a state or  
24     municipality may act, and it's not bound by the same  
25     constitutional restrictions that, for example, create the

1      structures of the Federal Government. But the key limitation  
2      that was recognized in *Binns* and in other cases is that  
3      Congress must be doing what a state or locality could do.

4              And we think that the final paragraph of *Binns* makes  
5      this point perfectly clear, because that was the point in the  
6      decision where the Supreme Court said that if Congress had  
7      instead passed the tax for the benefit of the nation, and so  
8      it was doing something that no state or locality could do, the  
9      analysis would be different. In that respect, Congress would  
10     be exercising authority at the national legislature, and so  
11     could be subject to these other constitutional constraints,  
12     even though it would still be applying that tax in the  
13     territory.

14              In its Reply Brief, the Oversight Board asserts and  
15     emphasizes that the tax in *Binns* was paid into the national  
16     Treasury. And they say, well, no state could do that, collect  
17     a tax and pay it to the national Treasury, but of course no  
18     state could have the members of Congress pass a law for it  
19     either. These are little procedural details. They don't go  
20     to the substance of the law and the question of whether that  
21     substance is something that falls within the domain of a state  
22     and local jurisdiction.

23              In *Binns*, the Supreme Court deemed it critical that  
24     the funds that went into the Treasury also came out of the  
25     Treasury to pay for the governance of the territory. So this

1      is really equivalent to what any state could do in collecting  
2      a tax and then using that tax to pay for the structures of the  
3      state government. And that was a critical element of the  
4      Court's analysis in recognizing that Congress could lawfully  
5      impose that tax in Alaska, just as a state could.

6                   So with respect to this local law issue, the relevant  
7      inquiry becomes, could a state or local government pass a law  
8      like PROMESA. And the answer to that is clearly no. No one  
9      on the other side is really arguing differently. It's  
10     acknowledged by the Oversight Board that principles of  
11     preemption, and of course the Contracts Clause, would mean  
12     that no state could create this kind of nationwide scheme for  
13     the discharge of debt.

14                   And, of course, this Court need look no further than  
15     to what Puerto Rico actually did when it tried to pass its own  
16     debt restructuring scheme. But Puerto Rico took this approach  
17     in the Debt Recovery Act, and it was invalidated by the  
18     Supreme Court in the *Franklin California Tax-Free Trust* case.  
19     So that demonstrates and further confirms that this isn't the  
20     kind of local law that would fall within the subject matter or  
21     domain of any state or locality, and that makes sense.

22                   PROMESA is a national bankruptcy law. The statute  
23     restructures debt. It provides a mechanism for this Article  
24     III court to exercise nationwide jurisdiction and order the  
25     discharge of debt held by creditors nationwide, not just

1      confined to Puerto Rico. Those judgments are entitled to full  
2      faith and credit. And so this looks nothing like the kind of  
3      law that any state or local government could pass in the  
4      exercise of its police powers or in otherwise attempting to  
5      manage its local affairs. And for that reason, PROMESA  
6      necessarily depends on Congress' federal authority in this  
7      regard to have that capacity and authority to pass national  
8      bankruptcy law. So that's an authority that's been recognized  
9      to be circumscribed by the uniformity requirement.

10           I want to respond for a moment to the points that  
11      Mr. Gershengorn and Mr. Humphreys raised about whether the  
12      analysis turns on whether Congress invoked Article I or  
13      whether it invoked Article IV, but for purposes of analyzing  
14      bankruptcy uniformity, that distinction doesn't matter. And  
15      we think that is perfectly clear from the analysis of the  
16      Supreme Court in *Gibbons*, where the United States made the  
17      same type of argument that there was another source of  
18      Congress' authority to pass the statute there, specifically,  
19      the Commerce Clause.

20           And so the United States said, because there was that  
21      Commerce Clause authority, it wasn't necessary to look at the  
22      Bankruptcy Clause at all or to apply the bankruptcy uniformity  
23      requirement. So what *Gibbons* said is it doesn't matter if  
24      there are multiple sources of authority to enact the law. The  
25      relevant question is, does this law touch on the subject of

1      bankruptcy. In other words, is it a law that's addressed to  
2      the relations of a debtor and its creditors? Is it a law that  
3      orders the discharge of debt? If so, then it's a bankruptcy  
4      law, and Congress can't avoid application of the uniformity  
5      requirement by suggesting that there's actually some other  
6      source of law that exists that fully justifies the action it  
7      took.

8                   So we think that the distinction here between  
9      "person" in Article I and Article IV is beside the point. The  
10     relevant question is, is PROMESA a bankruptcy law. And the  
11     answer is yes.

12                  I want to emphasize as well, though, that rather than  
13     applying any bright-line rule about whether PROMESA is subject  
14     to the uniformity requirement, the right approach here is to  
15     follow the functional analysis. This is the Supreme Court's  
16     test, and it's the way that it has approached these various  
17     questions about whether different constitutional provisions  
18     apply in the territories.

19                  And there was a statement in the Reply Brief that  
20     questions where this test comes from or asked what the  
21     grounding was. The answer is this comes straight from the  
22     Supreme Court. That was the language, in fact, that the  
23     Supreme Court used in the *Boumediene* case. There the Court  
24     specifically said that it was applying a functional approach,  
25     and the Court summarized and traced the Supreme Court's

1 decisions in this area, looking at a wide variety of different  
2 constitutional provisions to determine whether those  
3 provisions did or did not apply in the territory.

4 So the idea that --

5 THE COURT: Pardon me, Ms. Prelogar. *Boumediene*,  
6 again, was looking at the question of sovereignty, correct?

7 MS. PRELOGAR: It was looking at the question of  
8 whether the Suspension Clause applied extraterritorially,  
9 outside the United States.

10 THE COURT: Yes. And that related to whether the  
11 geographical area involved was actually *de facto* or *de jure*  
12 under the sovereignty of the United States?

13 MS. PRELOGAR: Yes. That was one of the issues in  
14 *Boumediene*, but it relied --

15 THE COURT: And that's the context in which the  
16 functional language came up as I recall.

17 MS. PRELOGAR: Yes. But I think what's clear is that  
18 in articulating that test, what the *Boumediene* court did is it  
19 looked at a number of precedents involving the territories;  
20 and specifically analyzed the approach the Court had taken in  
21 prior cases about whether constitutional provisions had  
22 applied; and specifically discussed a number of the cases that  
23 we've been discussing here this morning with respect to the  
24 same questions of purpose of constitutional provisions, the  
25 same questions of the practical effect of extending these

1 provisions to the territories.

2                   And I should emphasize, of course, that there are a  
3 number of additional cases that consider these same types of  
4 issues, about whether particular provisions in the  
5 Constitution extend to the territories, in a number of  
6 contexts. The Court has looked at the Commerce Clause. It's  
7 looked at, for example, the prohibition on passing *ex post*  
8 *facto* laws and bills of attainder. Various provisions of the  
9 Bill of Rights have been recognized to apply to the territory,  
10 and so would constrain Congress' action. That includes the  
11 First Amendment, the Fourth Amendment, the Eighth Amendment.

12                   And so I think that what this analysis demonstrates  
13 is that when Congress is taking action with respect to a  
14 territory, in each instance it's necessary to look at a  
15 particular constitutional provision and evaluate it on its own  
16 terms. That, in fact, explains the Article III examples that  
17 Mr. Bienenstock had cited this morning.

18                   I want to pause for a moment on the *American*  
19 *Insurance Company versus 356 Bales of Cotton* case. We think  
20 that that case is consistent with the pragmatic functional  
21 approach that the Supreme Court has taken in looking at  
22 whether particular constitutional provisions apply in the  
23 territories. So that was a case where the Congress had  
24 created territorial courts. It was in Florida, when Florida  
25 was still a territory. And the Supreme Court emphasized

1      there, and its analysis is repeated in any number of cases,  
2      that Congress has to have the power to structure territorial  
3      government. It has to have the power to create court systems,  
4      to create territorial legislatures, to delegate certain  
5      responsibilities to those territorial legislatures.

6              And in doing so, as a practical matter, and as a part  
7      of this functional approach, the Court has recognized that  
8      there are practical reasons not to give life tenure to  
9      territorial judges. For example, Florida later became a  
10     state. What would have become of the life-tenured municipal  
11     judges if, in fact, that Article III restriction had applied?

12              So there were practical reasons not to extend the  
13     Article III life tenure requirement to the territorial court.  
14     There were also practical reasons to ensure that the  
15     territorial courts could exercise admiralty jurisdiction, and  
16     that's because there were no federal courts operating side by  
17     side in Florida that could have exercised that jurisdiction.  
18     There it was a salvage claim. And so the concern was that the  
19     territorial government simply couldn't have functioned if  
20     there were particular types of claims, like salvage claims,  
21     that couldn't be heard in the territorial court.

22              None of this analysis suggests that Congress is just  
23     free from all constitutional constraints when it invokes  
24     Article IV. We think these cases just show that Congress  
25     wasn't required to follow that particular Article III

1      constraint in creating territorial courts for practical  
2      reasons.

3              And I'll emphasize as well that there's no  
4      explanation on the other side for why bankruptcy uniformity  
5      should not apply in the territories, looking again at the  
6      purpose of the constitutional provision, whether the purpose  
7      would be advanced by applying the law in the territories, and  
8      further looking at whether there would be any practical  
9      obstacles.

10             The purpose of the uniformity requirement, and this  
11     comes from cases like *Gibbons*, is to essentially prevent  
12     discrimination against creditors and thereby protect national  
13     commerce. So the time of a binding -- there were a wide  
14     variety of state discharge schemes in bankruptcy. There was a  
15     wide variation, and, in particular, a lot of discrimination  
16     against out-of-state creditors, against British creditors.  
17     And so the framers thought that Congress should have this  
18     power to create a unique -- I'm sorry, a uniform bankruptcy  
19     scheme that would guard against legislating so narrowly that  
20     it would enable this type of discrimination, and thereby,  
21     would be able to protect national commerce. And that purpose  
22     is fully advanced by having the uniformity requirement apply  
23     in the territories.

24             Puerto Rico, of course, has long participated in the  
25     national market for municipal debt. It's issued many, many

1      billions of dollars in bonds that are held by creditors  
2      throughout the nation. And, of course, these proceedings will  
3      affect the interest of investors and creditors around the  
4      nation.

5              So inventing bankruptcy laws for the territories from  
6      the uniformity requirement we think would harm national  
7      commerce by undermining the predictability and fairness of  
8      commercial regulations. It would harm the very debt market  
9      that Puerto Rico wants to gain access to again. And there's  
10     no practical impediment to applying the bankruptcy uniformity  
11     laws in the territories.

12             This isn't like the example of the territorial  
13     courts, unlike tenure. In fact, Puerto Rico was subject to a  
14     Chapter Nine bankruptcy for many decades, and there were no  
15     suggestions that that created any kind of practical problem or  
16     otherwise infringed on the flexibility that Congress might  
17     otherwise need with respect to the territories.

18             The emphasis on the purpose of Article IV, to give  
19     Congress flexibility as a general matter, it doesn't answer  
20     the question of why Congress specifically needs that  
21     flexibility to depart from the uniform Bankruptcy Rules in the  
22     territories. And so the Supreme Court analysis in *Aurelius*,  
23     we think has equal application here.

24             With respect to the Appointments Clause, the Court  
25     said, why should it be different just because the law relates

1 to Puerto Rico and other Article IV entities. We don't think  
2 that there's any good answer to that question here.

3 I want to make a final point in response to the  
4 arguments relying on tax uniformity precedent. And  
5 Mr. Humphreys has also referred to the naturalization  
6 precedent. At the outset, as I've mentioned, this is a  
7 provision-specific approach. The Supreme Court has never  
8 applied a one-size-fits-all analysis to the various  
9 constitutional provisions. And instead, in all of these  
10 cases, it's looked at the purpose of a particular provision  
11 and analyzed whether that should apply in the territories.

12 So at the outset, naturalization uniformity serves a  
13 different purpose. There would be practical obstacles to  
14 applying those naturalization rules across the board to  
15 territories, when some may actually disassociate from the  
16 United States and no longer have a political relationship,  
17 others might become ever closer and maybe achieve statehood.

18 Tax uniformity also serves a different purpose. It's  
19 about making sure that Congress doesn't favor certain states  
20 over others. So it's not intended to standardize creditor  
21 relief in the same way that bankruptcy uniformity is. And  
22 Congress' taxing power as well wasn't intended to preempt  
23 state tax authorities.

24 States, of course, have wide variation in their tax  
25 schemes today, and that's why cases like *Binns* could recognize

1      that Congress can create local taxes that reflect that same  
2 divergence, because any state or locality could do the same  
3 thing. But more fundamentally, the tax uniformity precedent  
4 traces back to the Supreme Court's decision in *Downes versus*  
5 *Bidwell*. And this, of course, was one of the Insular Cases.

6              Those cases have been wholly discredited. They rest  
7 on the racist colonial theories that inhabitants of  
8 territories are members of an alien race, that effectively  
9 inhabitants of territories aren't entitled to the same kind of  
10 constitutional protection as other citizens of the United  
11 States. And so the analysis in the tax uniformity precedent,  
12 and specifically Mr. Humphreys had emphasized this throughout  
13 the United States' language, that goes directly back to the  
14 view that you could treat territories as not being part of the  
15 United States, because of this alien race theory that is  
16 wholly discredited.

17              In the First Circuit, of course, and the Supreme  
18 Court have both said that the Insular Cases should not be  
19 extended. So our submission is that it wouldn't be proper to  
20 reflexively apply on tax uniformity precedent here -- those  
21 precedents serve a different purpose, and to try to extend  
22 their analysis automatically to bankruptcy uniformity we think  
23 would represent an extension of the Insular Cases that the  
24 Supreme Court has already disavowed.

25              This really actually comes full circle to the

1      Oversight Board's assertion that statutes passed pursuant to  
2      Article IV are, therefore, local laws, which therefore means  
3      that Congress can do whatever it wants with the territories,  
4      even if there would otherwise be constitutional restrictions  
5      on its authority. That would be perhaps the biggest extension  
6      of the Insular Cases of all, and it's not the law. The  
7      Supreme Court has rejected it. The First Circuit has rejected  
8      it. And we would ask this Court to reject it as well.

9              I'd like to turn now to the substantive uniformity  
10     argument, and move on to our arguments that Puerto Rico -- I'm  
11     sorry, that PROMESA violates the uniformity requirement.  
12     Mr. Humphreys at the outset has emphasized that Congress has  
13     flexibility under the uniformity requirement, but uniformity  
14     is not toothless.

15              I'm sorry, Your Honor. Can you hear me?

16              THE COURT: Yes, I can. I'm sorry. I'm just  
17     trying -- I interrupted you a couple of times, and I'm trying  
18     to restrain myself so that you can speak.

19              MS. PRELOGAR: I'm sorry. For some reason I wasn't  
20     lighting up on the screen dashboard, so I was worried that I  
21     had lost the connection.

22              THE COURT: No. I hear you very clearly.

23              MS. PRELOGAR: Excellent.

24              So as I was saying, the uniformity requirement isn't  
25     toothless. If you look at Supreme Court precedent, you can

1      distill two different types of restraints, and PROMESA here  
2      violates each of them. First, the Supreme Court recognized in  
3      the *Gibbons* case that Congress cannot legislate for such a  
4      narrow class of debtors that it effectively constitutes a  
5      private bankruptcy bill.

6              In *Gibbons*, Congress had passed a statute for a  
7      particular railroad bankruptcy, and had given priority to the  
8      claims of one group of creditors, the employees, over other  
9      groups of creditors, the bondholders. And what the Supreme  
10     Court said is that the statute was problematic, because  
11     Congress had legislated too narrowly; that it was effectively  
12     attempting to address the problems of one regional railroad,  
13     rather than to create a set of rules that could apply equally  
14     to all creditors and all debtors in a class.

15              And then the second requirement that the Supreme  
16     Court has recognized is one of geographic uniformity. Of  
17     course we acknowledge, and it's come up here again several  
18     times today, that Congress can respond to geographically  
19     isolated problems, for example, with respect to industries.  
20     So if you can imagine, if an industry was clustered in one  
21     region, Congress wouldn't, on that basis alone, be  
22     disempowered from acting. But Congress can't define the  
23     problem as one of geography itself, or else it would end run  
24     the basic bankruptcy policy of guarding against geographic  
25     discrimination.

1                   And just to try to make this more clear with a  
2 concrete example, if Congress created one bankruptcy scheme  
3 for California, and then a different bankruptcy regime for New  
4 York, that would aim at the very evil that the Bankruptcy  
5 Clause is intended to address. And so those kinds of explicit  
6 geographic distinctions in bankruptcy laws are disapproved.

7                   Now, the Oversight Board relies on *Blanchette*, and  
8 notes that there there was a geographic definition in that  
9 statute; that in *Blanchette*, the railroads that were covered  
10 by that statute were defined in terms of the region where they  
11 operated. But the critical thing to recognize is that the  
12 geographic definition in *Blanchette* was effectively shorthand,  
13 because it was possible to define that debtor class without  
14 reference to geography. The Supreme Court emphasized that  
15 fact. The Court said, this law applies to all relevant  
16 railroads then operating across the United States, and for  
17 that reason, the Court could conclude that it operated  
18 uniformly with respect to the debtor class, and also uniformly  
19 with respect to all creditors of the debtor class. In other  
20 words, that the definition of the region there didn't obscure  
21 that this was actually a law that was uniform throughout the  
22 United States.

23                   But here PROMESA transgresses both of these  
24 limitations. It's effectively a private bankruptcy bill for  
25 Puerto Rico, and Puerto Rico is a geographically defined

1 debtor. There can be no real dispute that Puerto Rico stands  
2 alone in having access to the unique Title III discharge of  
3 debt proceedings in PROMESA.

4 There was a brief argument, I believe, in the  
5 briefings by the Retiree Committee and the United States that  
6 the statute defines the word "territory" to include other  
7 territories. But the critical point is Congress purposefully  
8 excluded those other territories from PROMESA, and made clear  
9 that, in that way, only Puerto Rico would have access to  
10 PROMESA's debt adjustment process.

11 And then as well, geography alone determines the  
12 statute's coverage. There's no way to describe the debtor  
13 class subject to PROMESA without using that geographic  
14 definition. And Congress recognized this problem that there  
15 is emphasis. In Section 3(b), this is a severability  
16 provision, Congress expressly noted that PROMESA could be  
17 invalidated as a nonuniform bankruptcy statute in recognition  
18 that PROMESA applies to Puerto Rico and not to a broader  
19 debtor class.

20 So although we recognize that Congress has  
21 flexibility under the bankruptcy uniformity requirement,  
22 looking at the specific limitations that have been  
23 acknowledged in the case law, we think that PROMESA violates  
24 both of them.

25 Now, the Oversight Board has emphasized, and it came

1 up again this morning, that PROMESA applies not just to the  
2 Commonwealth, but also to the instrumentalities. And the  
3 problem with that argument is that the debtor class here is  
4 defined in express terms about the entities' relationship to  
5 each other, and again, it's defined in express geographic  
6 terms. So it's not like this is a statute that is aimed at a  
7 particular industry, or a statute that aims at particular  
8 status, like municipal status.

9 I think Mr. Bienenstock ticked off a long list of  
10 different types of industries that had been regulated under  
11 bankruptcy law, but here the debtor class is expressly defined  
12 in terms of the relation of the class of debtors to one  
13 another. The Section 511 defines Puerto Rico as the  
14 Commonwealth and its instrumentalities. Section 519 defines  
15 the instrumentalities as being part of the territory. And  
16 PROMESA further underscores its relationship in a variety of  
17 ways.

18 We've emphasized, of course, that the Oversight Board  
19 serves as the sole statutory representative of all the  
20 governmental entities in Puerto Rico. And this Court, the  
21 First Circuit, have both said and emphasized that the Board  
22 can carry out those duties in a holistic manner. So in taking  
23 steps on behalf of the instrumentality, it can consider the  
24 interests of the Commonwealth as well. And as a practical  
25 matter, this is, I think, also critically important. The

1 financial interests of the Commonwealth and the  
2 instrumentalities that are being adjudicated in these Title  
3 III proceedings have been found by the Court to be intertwined  
4 in various respects.

5 The Oversight Board made this clear in the COFINA  
6 proceeding when it said multiple times that COFINA had to go  
7 forward first as a gating item in the *Commonwealth case*,  
8 because whether the sales and use taxes were the property of  
9 COFINA or available resources of the Commonwealth was one of  
10 the critical, dominant, disputed legal issues in the case.  
11 And as a practical matter as well, the Commonwealth has  
12 exercised substantial control over revenues that are owed by  
13 statute to the instrumentalities.

14 Your Honor is well aware Ambac's objected to that and  
15 believes it's unlawful; but for present purposes, it shows the  
16 relatedness of the debtors covered by PROMESA, and underscores  
17 that this law implicates the same concerns as a private  
18 bankruptcy bill. Because if Congress is permitted to  
19 legislate so narrowly, if it can effectively define a debtor  
20 class in terms of this express relationship between the  
21 debtors, as here, then it can discriminate against creditors  
22 and undermine national commerce in ways that the founders  
23 aimed to prevent through adoption of the uniformity  
24 requirement.

25 It would be, for example, no different than

1 legislating private bankruptcy relief for members of one  
2 family, or to legislate a private bankruptcy bill for all the  
3 governmental units of just one state or one city. When the  
4 relationship between the debtors is the defining element of  
5 the class, then the interests in *Gibbons* equally applies. And  
6 the interest in avoiding the possibility of discrimination,  
7 and in protecting national commerce, we think should carry  
8 weight.

9 The Oversight Board has also argued that PROMESA was  
10 simply a response to a geographically isolated problem. And  
11 we think that that is flawed both factually and legally, so  
12 I'd like to briefly walk through each of those points.

13 Factually, Puerto Rico was not the only territory in  
14 financial distress when PROMESA was enacted. As we've  
15 explained in our briefing, Guam and the U.S. Virgin Islands  
16 had, likewise, seen their debt-to-GDP ratios balloon. Both of  
17 those territories had outstanding pension obligations that  
18 could raise questions about whether they would be able to  
19 continue their debt service at existing levels.

20 In early 2017, the U.S. Virgin Islands actually had  
21 more debt per capita than Puerto Rico. I believe it had  
22 19,000 dollars per person, whereas Puerto Rico had 12,000 per  
23 person. And, in fact, the Virgin Islands had lost access to  
24 capital markets at favorable interest rates, and some of its  
25 bonds had been downgraded to junk status.

1                   So the suggestion here that Puerto Rico stood alone,  
2 that it was the only territory that was in financial distress,  
3 or that could conceivably at some point need access to  
4 restructuring relief, is belied by the facts and the existence  
5 of other crises in other territories at the same time. But  
6 the more important point I think is the legal one, which is  
7 that if Congress could really draw these kinds of fine  
8 distinctions, and could say that Puerto Rico can have this  
9 bankruptcy bill, because it's most in need of reorganization,  
10 and it, therefore, can constitute its own debtor class, that  
11 would effectively mean that there's nothing left of the  
12 bankruptcy uniformity requirement.

13                   At that point, Congress could always define the  
14 problem narrowly, and it could create nonuniform laws down the  
15 line by identifying each particular debtor, looking at that  
16 debtor's financial situation, trying to identify  
17 characteristics that it thinks warrant a bankruptcy bill, and  
18 then creating that bankruptcy bill. And if that's all that  
19 that uniformity requires, is for Congress to identify the  
20 particular problems of a particular debtor, and then try to  
21 address that particular issue, the uniformity would have very  
22 little application at all.

23                   It's also not clear that this should even be about  
24 present financial distress. So this is the test the Oversight  
25 Board has offered where they focused on the notion that Puerto

1      Rico was most in need of restructuring, but the problem with  
2      that is that these kinds of bankruptcy regimes should be  
3      forward looking. The whole point is to create a uniform and  
4      stable set of rules about how the market is going to operate.  
5      And that's, of course, how Chapter Nine bankruptcy works.

6              In the Chapter Nine context, there is a set of rules,  
7      and municipalities and their creditors know those rules.  
8      Notwithstanding the fact that some municipalities may never  
9      need bankruptcy relief at all, the statute is not focused on  
10     kind of -- that present financial situation.

11             So for those reasons, we don't think that PROMESA can  
12     be justified here as a response to a geographically isolated  
13     problem without essentially reducing the scope of the  
14     uniformity requirement in ways that contrast sharply with what  
15     the Supreme Court has recognized is available under the  
16     uniformity requirement.

17             Finally, I want to briefly respond to  
18     Mr. Bienenstock's point about the asserted similarity between  
19     PROMESA and Chapter Nine. And at the outset, I want to  
20     emphasize that of course PROMESA creates a fundamentally  
21     different set of rules for Puerto Rico as compared to all  
22     other territories, because no other territory has access to  
23     court-supervised debt restructuring at all. The other  
24     territories are boxed out of and closed out of having  
25     bankruptcy relief.

1                   And so in that sense, just thinking about the  
2 comparison, PROMESA creates an entirely different set of rules  
3 for Puerto Rico as would be applied in any other territory,  
4 and that is one of the relevant distinctions that we think  
5 matter for uniformity purposes. But even just looking at  
6 Chapter Nine, there are a number of differences between the  
7 scheme that PROMESA creates and other bankruptcy laws, and  
8 they fall into -- we've listed a number of provisions in our  
9 Complaint and discuss a number of provisions in our briefing.

10                  I wanted to quickly walk through the three principal  
11 categories of difference that we see. The first is PROMESA's  
12 plan confirmation provision. This is Section 314(b)(7).  
13 Mr. Bienenstock discussed it as well. This is the provision  
14 that provides that a plan can only be confirmed if it's  
15 consistent with the Board's certified fiscal plan. And the  
16 fiscal plan provision, which is Section 201, then settles,  
17 establishes exclusive requirements for allocating funding  
18 among the Commonwealth's creditors.

19                  And the Board has said that it can interpret and  
20 apply those requirements in its discretion, but the issue here  
21 and the problem we perceive is that the fiscal plan then  
22 becomes a critical input into the plan of adjustment. And  
23 that has no comparable analog in Chapter Nine. There's no  
24 equivalent to 314(b)(7) in Chapter Nine at all.

25                  The fiscal plan isn't just projection. It's

1 determination by the Oversight Board about how much money the  
2 Commonwealth can expend to service its debt, and how to  
3 allocate that funding among different creditors. So this  
4 really does, in our view, raise the risk that the fiscal plan  
5 will essentially be used to set a benchmark for feasibility in  
6 a way that differs from other municipal bankruptcies. And  
7 that's the first category.

8 The second category is the limitations on judicial  
9 review. So this comes from Section 106(e). It applies, of  
10 course, to the Board's certification decision and its  
11 certification of the fiscal plan. But the Board has suggested  
12 it has authority under PROMESA to allocate the Commonwealth's  
13 revenue among creditors in a manner that it asserts can't be  
14 reviewed at plan confirmation. And if that were true, that  
15 would be another substantial difference between how Chapter  
16 Nine operates and how PROMESA works.

17 And then the final category I would point to is the  
18 role of the Oversight Board itself. The Oversight Board,  
19 again, is the sole statutory representative for all of the  
20 debtors. It has taken over the functions in this bankruptcy  
21 proceeding that would otherwise, in the Chapter Nine context,  
22 be exercised by state and local officials. And those state  
23 and local officials would not have the same conflict of  
24 interest that we perceive the Board to have. They also would  
25 be politically accountable in a way that the Board is not.

1     They would be accountable to the public, to creditors, and to  
2     their constituents. So, in that sense, we think that there  
3     are any number of differences between PROMESA and Chapter Nine  
4     that are relevant here.

5                 In its briefing, the Board suggests that, actually,  
6     the Court shouldn't look at Titles I and II of PROMESA at all.  
7     Instead, the Court should just focus on Title III. Of course,  
8     just focusing on Title III, there are fundamental  
9     distinctions, as I just mentioned, for example, with the plan  
10    confirmation provision. More fundamentally, these are an  
11    integrated bankruptcy scheme. Title III itself incorporates  
12    and relies on Title I and Title II authority.

13                So as I just mentioned, of course, the plan  
14    confirmation provision directly incorporates the Board's  
15    certified fiscal plan by requiring that consistency with the  
16    fiscal plan for purposes of confirming the plan. And Title I,  
17    in the existence of an Oversight Board that's created under  
18    that provision, itself provides the gateway to the bankruptcy  
19    proceedings, because absent having an Oversight Board created  
20    in accordance with Section 101 of PROMESA, an entity isn't  
21    entitled to adjust its debt under the statute at all.

22                So in that sense, we think that these provisions all  
23    do form an integrated scheme. And I would point as well to  
24    Congress' own determination in this regard. Congress  
25    expressly linked these provisions for purposes of

1      severability. It provided that if Title III is invalid, then  
2      Titles I and II of PROMESA should be invalidated as well. So  
3      we think that's further evidence that Congress itself viewed  
4      these provisions as operating and working together, in tandem,  
5      to create the debt adjustment scheme that's at the core of  
6      PROMESA. But it also means the severability provision -- that  
7      this issue is a little bit academic, because whether or not  
8      the Court looks at Titles I and II, for purposes of assessing  
9      the uniformity, it's clear that Title III is a bankruptcy  
10     statute; that it addresses the subject of the relations  
11     between debtors and creditors; and for that reason as well,  
12     the severability provision and the lack of the possibility of  
13     severability demonstrates that all three of these titles have  
14     to rise or fall together.

15                My final point on this is just to emphasize again  
16     that Congress itself recognized that a court could find  
17     PROMESA to be nonuniform. That's why it included the language  
18     in Section 3(b), specifically acknowledging that a court could  
19     hold that PROMESA is invalid as a nonuniform bankruptcy  
20     statute. We think the Court should reach that conclusion  
21     here.

22                Now I'll turn, unless the Court has questions, to the  
23     severability issues. And I'll be brief on this, because the  
24     parties' briefs discussed this in full. There hasn't been a  
25     lot of discussion about it at the hearing this morning, but I

1 did want to quickly touch on our perspective on why the  
2 Severability Clause cannot be implemented in this case.

3 So Section 3(b) is a provision where Congress  
4 recognized at the outset that PROMESA could be declared  
5 unconstitutional, but then said that the fix here is that the  
6 Court shall extend PROMESA -- and this is a quote -- to any  
7 other similarly situated territory, end quote, that requests  
8 the establishment of an Oversight Board. We don't think that  
9 fix can be implemented. And there are really two key problems  
10 to focus on.

11 The first is that Congress didn't define what  
12 characteristics or criteria should be used to determine if a  
13 territory is substantially similar, and that's a legislative  
14 judgment. It goes to the question of what the debtor class  
15 should be, which entities PROMESA should cover in the first  
16 place. That's the legislative domain to determine exactly  
17 what the scope of the debtor class should be for bankruptcy  
18 purposes.

19 And it's not as though there's only one way to draw  
20 the line. One possible way would be to say that all  
21 territories should be covered, that, basically, the status of  
22 being a territory is itself the similar situation that the  
23 territories confront. But there are other ways. The  
24 Oversight Board has suggested that the level of financial  
25 distress should be relevant. And then that raises the

1 question, well, what is the relevant level? Is it with a  
2 metric? Is it debt-to-GDP ratio? Is it having bonds  
3 downgraded to junk status? Is it losing access to capital  
4 markets? Our submission is that those are questions for  
5 Congress to answer.

6 The Oversight Board suggests that the Court would  
7 have to consider substantial similarity as part of  
8 adjudicating the claim in the first place, but that's not  
9 actually how uniformity analysis proceeds. It's not necessary  
10 to consider what lines Congress could draw, or to go beyond  
11 and try to dictate for Congress how it has to legislate on a  
12 more uniform basis. That's not the role of the Court.  
13 Instead, what the Court does in a uniformity challenge is to  
14 look at the lines that Congress actually did draw and  
15 adjudicate their constitutionality.

16 And then finally, even if it were possible to get  
17 past this hurdle and to identify the similarly situated  
18 territories, the problem is that there is no way to implement  
19 the Severability Clause without adding words and provisions to  
20 PROMESA that aren't currently there. So, again, under Section  
21 302, an entity can only qualify as a debtor if it has an  
22 oversight board established for it under Section 101. And  
23 this is a limitation that's repeated throughout other  
24 provisions of PROMESA.

25 So, for example, in Section 5(7), this is another

1      definitional provision, a covered territory is defined as a  
2      territory for which an oversight board has been established  
3      under Section 101. But the problem is that if you've looked  
4      to Section 101, there's no provision there that provides any  
5      mechanism to establish an oversight board for any other  
6      territory. Section 101 is focused and creates the Oversight  
7      Board for Puerto Rico alone.

8                   So that means that to try to implement this  
9      severability fix, the Court would have to actually add words  
10     to the statute, add provisions to the statute that aren't  
11     currently there, and add this mechanism into Section 101. And  
12     that's not how severability analysis generally works. It's  
13     about striking words from a statute and removing an  
14     unconstitutional provision. It's not about adding provisions  
15     that aren't currently there.

16                   The other side has invoked cases like *Barr versus*  
17     *American Association of Political Consultants*, but that  
18     actually reflects the traditional way that severability works.  
19     There, there was an unconstitutional limitation in a statute  
20     that the Court can strike, and it had the effect of expanding  
21     the statute's scope. But the Court didn't add any words to  
22     the statute to do that.

23                   This stands in sharp contrast, and I'll just note  
24     that we really boiled the ocean here in looking for comparable  
25     situations where either a Severability Clause like this

1 exists, or where courts have considered and -- considered  
2 whether to enforce such a clause, and we couldn't find  
3 anything. This is a really unique kind of provision. And  
4 ultimately, although Congress recognized the uniformity  
5 problem inherent in PROMESA, it didn't provide an appropriate  
6 mechanism for the Court to fix it itself. That has to be the  
7 work of Congress, to draft the uniform statutes that can  
8 provide bankruptcy relief to Puerto Rico and a wider debtor  
9 class.

10 THE COURT: I do have a question for you about this.  
11 If the Court were to take Congress at its word, and extended  
12 the statute, using the words of Congress, to similarly  
13 situated territories that request an oversight board, by the  
14 structure of PROMESA, the territory, the would-be similarly  
15 situated territory can't get any further until it has an  
16 oversight board, because, otherwise, Title II doesn't operate  
17 and the Title III petition can't be filed.

18 So doesn't that language essentially funnel the  
19 threshold question of what territory is sufficiently  
20 situated -- similarly situated to merit an oversight board,  
21 back to Congress, so that Congress is making the determination  
22 as to whether the particular territory is eligible, but what  
23 the Court would be doing would be taking up Congress'  
24 invitation or grant of permission to open this line of  
25 application back to Congress under this statute?

1                   So it seems to me that Congress is not requiring the  
2 Court to decide who is similarly situated today, except that  
3 it would have to be a territory, and giving Congress the  
4 opportunity to make the finer distinctions on a particular  
5 record with respect to a particular territory. So why is that  
6 a problem?

7                   MS. PRELOGAR: Well, I think it's absolutely right  
8 that Congress would be best positioned and is the only entity  
9 with authority to make the determination about which  
10 territories are similarly situated. So what that means is it  
11 would require further Congressional action to expand PROMESA's  
12 scope and to ensure that there were other territories that had  
13 access to bankruptcy.

14                   And, in fact, in the drafting history, originally,  
15 Congress had drafted this to provide a mechanism in Section  
16 101 for other territories to have oversight boards established  
17 for them, but Congress expressly removed that provision from  
18 the statute before finalizing PROMESA. And that's what  
19 ultimately turned this into a statute that was focused only on  
20 Puerto Rico.

21                   If I'm understanding Your Honor's question correctly,  
22 I think the problem is that this really does have to go back  
23 to Congress. So there's no way for the Court itself to  
24 determine the similarly situated territories and then add that  
25 provision to PROMESA. That's what all the parties have

1 understood the Severability Clause to dictate. And it's not  
2 an enforceable remedy. This means that it would have to go  
3 back to Congress, and then Congress could take that action and  
4 make the determination about how to legislate with a broader  
5 debtor class in mind.

6 THE COURT: Thank you.

7 MS. PRELOGAR: I'd like to turn now to the procedural  
8 issues in the case, and I want to begin with laches in  
9 particular. And I want to respond to the allegations that the  
10 suit is untimely.

11 There have been a lot of words thrown around in the  
12 briefing that this was strategic delay, that this was  
13 gamesmanship on Ambac's part, and I want to push back  
14 forcefully on that characterization. The critical thing to  
15 recognize here is that -- the way that the injury to  
16 creditors, and to Ambac in particular, has become more  
17 apparent and more concrete over time through the course of the  
18 proceedings.

19 So it's not as though Ambac was immediately injured  
20 in a concrete sense, in a practical way, by the fact that  
21 Congress passed this nonuniform statute. We're not purporting  
22 to be constitutional purists who just have an abstract or  
23 academic interest in ensuring that Congress stays within  
24 constitutional limits. Instead, we're arguing that Congress  
25 exceeded those limits in a manner that over time has enabled

1      the Oversight Board to discriminate against creditors in  
2      profound ways that finally prompted Ambac to file this suit.

3                 And litigation like this is an investment. There's  
4      always a question of whether it's worth it to bring a case.  
5      In the beginning, and in the prior phases of this proceeding,  
6      it wasn't fully apparent how these nonuniform provisions of  
7      PROMESA would be interpreted, or what authority the Board  
8      would seek to claim under the provision. This was a novel  
9      thing for us to see. There wasn't anything exactly like it.

10                And earlier on, in fact, the Board adhered far more  
11      closely to normal bankruptcy procedure. For example, in the  
12      COFINA Title III, the Board appointed an independent  
13      representative to represent COFINA, that thus eliminated the  
14      same concerns about conflicts of interest. And it also wasn't  
15      clear in the beginning exactly how PROMESA would be  
16      interpreted, what some of these nonuniform provisions would  
17      mean in practice, what practical effects they would have. But  
18      as time has gone on, as we've received additional decisions  
19      from this Court and from the First Circuit, it's illuminated  
20      the meaning of those provisions.

21                And I'm thinking here, for example, of decisions  
22      about Section 106(e), and the nonreviewability of the  
23      Oversight Board's fiscal plan. Of course, there have been the  
24      decisions I referred to earlier from this Court and from the  
25      First Circuit on the holistic approach that the Board may

1 employ in these proceedings.

2 As this Court knows, Ambac's resisted many of these  
3 interpretations at nearly every turn. But the point is that  
4 PROMESA's nonuniform provisions, as they have been  
5 interpreted, have made far more clearly the various ways in  
6 which PROMESA operates differently from other bankruptcy laws.

7 And the other relevant change here has been how the  
8 Oversight Board has, over the course of the Title III  
9 proceedings, itself taken increasingly expansive positions  
10 about the authority that it thinks has been granted under  
11 PROMESA. Those positions have themselves brought into sharper  
12 and more concrete focus the harms that are caused by the lack  
13 of uniformity.

14 So, for example, the Board's theory of preemption has  
15 evolved over time, and now the Board is arguing that PROMESA  
16 preempts all pre-PROMESA territorial law. But the Board's  
17 further saying that it can selectively invoke that preemption  
18 rationale to, in essence, choose for itself, pick the winners  
19 and losers of which creditors to favor in the Title III  
20 proceeding. And that's culminated in the Proposed Plan of  
21 Adjustment that we're currently reviewing, that gives 90  
22 percent recovery to the pension claimants, and then gives  
23 nearly all of the remaining plan consideration to the GO  
24 bondholders, while revenue bondholders would receive less than  
25 one percent on their claims.

1                   So, you know, ultimately, when a party's injury like  
2 this becomes more pronounced or more apparent over time,  
3 courts have recognized that laches shouldn't stand as a bar to  
4 the suit. And I would point the Court in particular to the  
5 decision in *Garza*. This is a decision we cite from the Ninth  
6 Circuit that involved an unconstitutional redistricting plan.

7                   There the Ninth Circuit recognized that the  
8 plaintiff's challenge to the plan was on its face, and could  
9 have been brought at the moment the plan was adopted; but the  
10 plaintiffs had waited to see how the injury would develop,  
11 what that plan would produce. And it wasn't until after  
12 several election cycles, when it became clear that that plan  
13 was producing serious concrete injury, that the plaintiff  
14 filed suit. And the Ninth Circuit has said that that period  
15 of delay was justified given the way that the facts on the  
16 ground had shifted.

17                  A contrary rule, of course, would force litigants to  
18 file suit instead at the earlier possible moment, so  
19 incentivize, essentially, constitutional litigation, and  
20 discourage waiting and any possible voluntary dispute  
21 resolution.

22                  The other point I want to make on the laches claim is  
23 that the arguments to laches really ignore the legal framework  
24 here that applies to claims like this one where we're seeking  
25 prospective relief for an ongoing injury, and it's really

1     important to emphasize that context. Our argument here is  
2     that PROMESA is an unconstitutional statute that creates  
3     ongoing injury, that didn't just happen at one discrete moment  
4     in time when Congress passed the statute, but rather creates  
5     the potential for harm that exists and continues to this day.

6                 And courts are cautious about applying laches to  
7     claims for prospective relief generally, but especially to an  
8     unconstitutional statute that affects a wide variety of  
9     people. But part of that is the practical recognition that  
10    the harm truly can't be said to be remote in time in that  
11    instant. You know, the typical case of laches, the harm  
12    happened at one point in the past, many years have elapsed,  
13    and then the plaintiff seeks a retrospective remedy. And  
14    there there might be prejudice, because witnesses memories  
15    might fade, documents might have gotten lost, and so that's  
16    kind of the quintessential application where laches has been  
17    held to apply.

18                 But there's a fundamental difference when there's an  
19     ongoing constitutional injury. And, again, *Garza*, the Ninth  
20     Circuit case I've referred to, recognized this principle and  
21     held that even though the plaintiff had waited years to  
22     challenge the unconstitutional redistricting plan, laches  
23     didn't bar the claim.

24                 There's a practical component as well, of course,  
25     because if an unconstitutional statute remains in effect, then

1      it could trigger a new lawsuit at any time. There's not the  
2      same idea or prospect that there's a discrete past injury that  
3      happened so long ago that now the parties' rights have kind of  
4      become settled through the passage of time.

5              Here, for example, imagine if the Oversight Board  
6      were to file a new Title III tomorrow, let's say for PRIFA.  
7      There would be no argument that a uniformity challenge could  
8      be barred in the context of that Title III. So there's no way  
9      to get the repose of the laches doctrine in that. There's no  
10     way that -- have it be a concrete past dispute that's settled.  
11     The only way to get the repose is to actually adjudicate the  
12     constitutional issue and decide whether or not PROMESA is a  
13     constitutional bankruptcy statute.

14              Just one final point on laches with respect to  
15     prejudice. Mr. Friedman had mentioned that the money that the  
16     parties have expended is part of the Title III proceedings,  
17     but it's important to recognize that laches looks at whether  
18     the delay itself is what caused the injury. It's almost like  
19     a detrimental reliance kind of inquiry. And here there's just  
20     no reasonable argument that these fees would not have been  
21     expended if the suit had been filed earlier.

22              The Appointments Clause litigation was pending the  
23     whole time. Other challenges, of course, had been pending.  
24     And it hasn't stopped the Oversight Board from pressing  
25     forward, so I don't think there's any real argument to be made

1      that the Oversight Board would have discontinued its efforts  
2      in these Title III proceedings if only the suit had been filed  
3      earlier. And for that reason, we don't think laches can bar  
4      this suit.

5              I'll turn now to the estoppel doctrine. I want to  
6      emphasize at the outset, Mr. Friedman has kind of generally  
7      referred to equitable principles, but these are doctrines,  
8      narrow doctrines with distinct elements. And here, down the  
9      line, none of the elements of constitutional or judicial  
10     estoppel are satisfied.

11              So just focusing in on constitutional estoppel for a  
12     moment, the Supreme Court has made clear that the statute has  
13     to create a unique benefit that didn't previously exist, and  
14     then the litigant has to voluntarily elect to receive that  
15     benefit, so essentially opt into the statute for a scheme in  
16     the first place. You can't choose to receive a benefit and  
17     then seek to remove conditions on the receipt of the benefit  
18     under the statute. It's basically the articulation the Court  
19     has adopted.

20              But here there's no benefit in the first place.  
21     PROMESA doesn't create new or special rights for creditors.  
22     It, in fact, provides a debt adjustment mechanism that  
23     interferes with their pre-existing rights. So it stands in  
24     sharp contrast to cases where the Court has concluded that  
25     there was a statutory benefit.

1                   For example, *Robertson versus FEC*, the Oversight  
2 Board cites this case, that was a statute that created a pool  
3 of money for presidential candidates who could voluntarily  
4 choose to accept those matching funds. There's nothing like  
5 that here. Their sole argument is that Ambac obtained a  
6 benefit in COFINA based on the amounts it lists in terms of  
7 the COFINA Plan.

8                   But the Board ignores that Ambac was owed more than  
9 it was paid. And there's just no case suggesting that a  
10 bankruptcy statute that authorizes the discharge of debt and  
11 impairs the obligation of contracts can instead be  
12 characterized as a benefit to creditors for estoppel purposes.  
13 It essentially requires changing the frame of reference and  
14 saying, well, Ambac could have been paid even less.

15                  And that's essentially what the argument is here,  
16 that in a world without PROMESA, Ambac is actually better off  
17 now in the grand scheme of things, but that's just not how  
18 constitutional estoppel works. And I point the Court to the  
19 Supreme Court's decision in the *Kadrmas* case. This was the  
20 school bus fee case.

21                  There the argument was made that absent that school  
22 bus statute, the plaintiff would have had to pay even more  
23 money, because private bus transportation costs ten times the  
24 amount of the public bus fee. And the Court rejected that  
25 argument and said, you can't characterize a benefit in that

1 way. We think the same argument applies here.

2 There's also not the same showing of voluntariness.

3 Ambac, of course, had no control over whether to become  
4 subject to PROMESA. It was the Board that decided in its sole  
5 discretion to file the Title III proceeding in PROMESA -- I'm  
6 sorry, for COFINA. And at that point, of course, Ambac tried  
7 to defend its rights and interests in the context of the  
8 COFINA proceeding, but we've cited ample precedent that  
9 emphasizes that when a plaintiff seeks to protect its business  
10 interests under a statute that it had no choice to become  
11 subject to in the first place, it is not estopped. And those  
12 cases include *Abie, State Banks*, also the *Union Pacific*  
13 *Railroad Company* case.

14 Turning quickly to judicial estoppel, the key problem  
15 here is there's no directly inconsistent position. Ambac has  
16 never argued that PROMESA is not subject to bankruptcy  
17 uniformity. It's never argued that PROMESA satisfies  
18 bankruptcy uniformity. That issue just hasn't previously been  
19 presented, discussed by Ambac, or adjudicated by this Court.

20 The theory of judicial estoppel rests on a single  
21 filing in the COFINA proceeding, where Ambac was addressing a  
22 different issue, a discrete issue this Court had posed about  
23 whether the Court had authority to rule on the validity of the  
24 new bond legislation. But that was a question of statutory  
25 authority or inherent authority of this Court to be able to

1 consider Commonwealth law. There was no issue presented of  
2 whether Congress had validly passed PROMESA under the  
3 bankruptcy uniformity requirement. And that's an important  
4 thing to recognize.

5 The First Circuit precedent required a directly  
6 inconsistent position, a mutually exclusive position. So, for  
7 example, in the *Lydon versus Boston Sand and Gravel* case,  
8 which we've cited, the litigant said in the first proceeding  
9 the state law provided the exclusive remedy --

10 (Sound played.)

11 MS. PRELOGAR: -- and then turned around in the  
12 second case and argued that federal law provided the exclusive  
13 remedy. That's a case where a litigant took a directly  
14 inconsistent position on the exact issue that was presented,  
15 and the Court held that judicial estoppel could apply. But  
16 this case is far more comparable to the ones we've cited,  
17 where the allegation instead is that there's been some kind of  
18 implicit change of position, and that the Court should read  
19 something into that.

20 I would point the Court to the *RFF Family Partnership*  
21 case, which we think demonstrates, based on very similar  
22 reasoning, that there's just no argument here that the  
23 directly inconsistent position prong could be satisfied.

24 I'll make just one quick point about the contractual  
25 bar claim. The Oversight Board didn't mention it today, and

1 practically abandoned the claim in its Reply Brief. And we  
2 think that's for good reason.

3 There's no showing here that this lawsuit in any way  
4 violates the COFINA Plan Support Agreement. The COFINA Plan  
5 became effective nearly two years ago now. The Plan Support  
6 Agreement has terminated, and by its own terms, it has no  
7 continuing effect. That comes from Section 6.1(b) of the Plan  
8 Support Agreement, which says that the agreement was over when  
9 the Plan was substantially consummated. That was back in  
10 February, 2019. And it also comes from the Section 6.2  
11 provisions that expressly state that, after termination, all  
12 the other provisions are null and void and have no force and  
13 effect. It lists some provisions that survive termination,  
14 but the contractual claims that the Board is pressing here  
15 isn't included on that list.

16 The Oversight Board doesn't engage with the  
17 contractual terms at all. We think the terms are clear, and  
18 squarely foreclose the Board's claims. But I should just  
19 emphasize, as my final point, that even if the PSA were still  
20 in effect, this suit does not violate it, because the COFINA  
21 Plan has been consummated and can't be undone. The old bonds  
22 have been canceled. The new bonds have issued. They've  
23 traded on public markets. The distributions have been made.

24 (Sound played.)

25 MS. PRELOGAR: So for that -- so I will just conclude

1      by saying that --

2                    THE COURT: Yes, please finish your sentence.

3                    MS. PRELOGAR: Thank you. Thank you. I appreciate  
4                    that.

5                    That there's no real claim here, nor could there be,  
6                    that there's a contractual violation. And for these reasons,  
7                    there's no basis to dismiss the Complaint, and we would  
8                    respectfully request that you deny the Board's Motion to  
9                    Dismiss.

10                  THE COURT: Thank you, Ms. Prelogar.

11                  MS. PRELOGAR: Thank you.

12                  THE COURT: We will now turn to the rebuttal  
13                  arguments, and first up is the Retiree Committee for five  
14                  minutes.

15                  MR. GERSHENGORN: Thank you, Your Honor. Ian  
16                  Gershengorn again.

17                  I just want to make a few quick points. First, with  
18                  respect to whether the Uniformity Clause applied, Ambac  
19                  contends, and you've heard this morning that our position is  
20                  based on the idea that all constitutional constraints are  
21                  inapplicable; there's an on-off switch or a categorical bar.  
22                  But as Your Honor observed, that is not our argument. Our  
23                  argument is specific to the Bankruptcy Clause and the  
24                  bankruptcy uniformity provisions.

25                  So to be clear, we think that it doesn't apply for

1      two main reasons: One, because the Bankruptcy Clause is not a  
2      structural limit on all federal power, but instead a tailored  
3      limit on a particular enumerated Article I power. And,  
4      second, because the Supreme Court and other courts have  
5      already held that the other uniform provisions in the Revenue  
6      Clause and the Naturalization Clause do not limit Congress'  
7      powers in the territories.

8              Second, Ambac said we don't identify any reason not  
9      to apply the Bankruptcy Uniformity Clause to the territories,  
10     but that simply isn't true. There's a very clear reason, and  
11     that is, the point of Article IV is disuniformity. It is to  
12     give Congress a wide berth for inventive statesmanship.

13              As the Supreme Court has said, it's intended to give  
14     broad latitude to develop innovative approaches to territorial  
15     governance. Presumably, that is exactly why the Court has not  
16     applied the uniformity provisions of the tax -- of the Revenue  
17     Clause, and why courts have not apply the uniformity provision  
18     of the Naturalization Clause to the territories.

19              In response, and this is my third point, Ambac says  
20     that somehow you should distinguish between the Revenue  
21     Uniformity Clause and the Naturalization Uniformity Clause on  
22     the one hand, and bankruptcy on the other. But that is flatly  
23     wrong. First, the text is exactly the same for all three  
24     provisions. It would be an extraordinary means of  
25     constitutional interpretation to interpret the exact same

1      clause in neighboring provisions in diametrically opposed  
2      ways.

3              Second, of course the Court itself has looked to all  
4      three clauses when interpreting each other. That was true in  
5      *Blanchette*, and it was true in *Ptasynski*, in which in both of  
6      those cases, the court looked to the other provisions in  
7      interpreting the provision before it. All three provisions  
8      use the same text, and the Court ostensibly interpreted them  
9      all of a piece.

10             Third, Ambac says that you shouldn't rely on *Binns*  
11      and the Revenue Clause, because it's an extension of the  
12      Insular Cases, but that is simply not the case. In fact,  
13      *Binns* itself, which applied, of course, to Alaska, started the  
14      analysis by saying on page 490 of the opinion, it is  
15      unnecessary to consider the decisions in the Insular Cases,  
16      though it is clear that *Binns* is not an Insular Case and that  
17      the logic in *Binns* controls this Court.

18             And fourth, on this point, Ambac says that *Gibbons*  
19      makes clear that the Territory Clause can't be used to, quote,  
20      unquote, override the Bankruptcy Clause. But in *Gibbons*, it  
21      was a very different issue, because reliance on the Commerce  
22      Clause there would have rendered the uniformity --

23             (Sound played.)

24             MR. GERSHENGORN: -- entirely null and void. But, of  
25      course, that's not the case here.

1           If you apply -- if you don't apply uniformity to the  
2 Territories Clause -- the Uniformity Clause of the bankruptcy  
3 provision has ample scope, the scope it has always had, to  
4 prevent discrimination among the United States.

5           Let me turn now to whether this is a local statute.  
6 Again, Ambac mischaracterizes our argument by saying, we think  
7 any time Congress invokes Article IV, that's a local statute.  
8 That is not our position. Our position is that this is, by  
9 its terms, a local law. We think *Aurelius* makes that clear.

10           Ambac says that *Aurelius* held something different,  
11 and of course they do, but *Aurelius*' discussion of whether  
12 officials' duties were primarily local is obviously relevant  
13 to whether PROMESA itself is local. And what the Court said  
14 was the Board's duties are "quintessentially local," because  
15 they, quote, concern the finances of the Commonwealth, not the  
16 United States.

17           Ambac then repeats its argument that a state  
18 legislature could not pass it, but that misunderstands  
19 Congress' territories power. What the Court has said is  
20 Congress has, quote, full and complete legislative power over  
21 the people of the territories, and practically unlimited  
22 powers of legislation over the territories.

23           Finally, let me address Ambac's argument that this is  
24 somehow a private bill. I believe counsel said this is like  
25 an act for a single family. Well, of course Puerto Rico

1 provides services to three million people, and Congress found  
2 expressly that fiscal emergencies were limiting its power to  
3 do so. That is nothing like a family or a single railroad.

4 I also want to say, in *Ptasynski*, one of the things  
5 the Court said that really hasn't gotten a lot of play here  
6 today is that whereas here Congress has exercised its  
7 considered judgment with respect to an enormously complex  
8 problem, we are reluctant to disturb its determination. It  
9 seems to me that the Supreme Court's wisdom there with respect  
10 to the Uniformity Clause and the revenue -- the uniformity  
11 provision in the Revenue Clause applies directly to the issue  
12 before this Court today. The uniformity provision was not  
13 intended by Congress --

14 (Sound played.)

15 MR. GERSHENGORN: -- to -- nationwide enactment to  
16 deal with local conditions. We think that Ambac's arguments  
17 here today are non-persuasive, Your Honor.

18 Thank you, Your Honor.

19 THE COURT: Thank you, Mr. Gershengorn.

20 We now have rebuttal from AAFAF for two minutes.

21 Mr. Friedman, I think you need to unmute. Remember  
22 it's both the dashboard and your phone.

23 Mr. Friedman, I'm still not hearing you.

24 MR. FRIEDMAN: In order to --

25 THE COURT: There you are.

1                   MR. FRIEDMAN: Thank you, Your Honor.

2                   I have a lot to say. I'm going to try to say it as  
3 clearly as I can.

4                   The first is that Ambac has completely ignored that  
5 it brought a facial challenge to that institute. There was no  
6 response to that argument. If you go back and read its  
7 original Complaint, starting from day one of this case, they  
8 have complained about Section 106; they have complained about  
9 illegal fiscal plans; they have complained about unlawful  
10 takings. None of that has changed. And the argument that  
11 somehow things are different now is just incorrect.

12                  Second of all, Ms. Prelogar completely misunderstands  
13 the conflicts and holistic approach decisions of this Court  
14 and the First Circuit which relate to established principles  
15 under Chapter Nine, that this Court and the First Circuit have  
16 cited and do not rely entirely on PROMESA precedents. So it's  
17 just inaccurate to say that those have only evolved over time.  
18 Those relate to Eighth and Ninth Circuit decisions that  
19 interpret, excuse me, Chapter Nine for years.

20                  The third point I want to make is that certainly  
21 Ambac could have acted more quickly on this. It could have  
22 sought injunctive relief. So the idea that it didn't delay is  
23 untrue.

24                  The next point I want to make with respect to laches  
25 is Ms. Prelogar cites the *Garza* case, but of course that case

1      had nothing to do with ongoing restrictions. The plaintiffs  
2      there wanted to go in and seek, for example, to revoke the  
3      votes of legislatures that had been effected under prior  
4      districts. That would be the equivalent of the remedy sought  
5      here. This is to destroy an ongoing project.

6              There was no response to arguments about rejecting  
7      contracts or rights that have already been determined. Only a  
8      focus on fees. And speaking of fees, Ms. Prelogar completely  
9      ignored the fact that her client signed up to the Plan Support  
10     Agreement with COFINA, not to receive benefits under a plan of  
11     adjustment, but to receive unique and special benefits in  
12     securities design and payments of tens of millions of dollars  
13     of legal and professional fees. That's not being a simple  
14     recipient of a plan treatment.

15              (Sound played.)

16              MR. FRIEDMAN: That is being a strong proponent of a  
17     plan.

18              Your Honor, if I may just finish. And, finally, on a  
19     very specific issue, I would encourage the Court to go back  
20     and read paragraph four in Ambac's pleading in support of  
21     COFINA where it, with respect to specifically Section 314,  
22     focuses on a substantive difference, and notes -- between the  
23     Bankruptcy Code and PROMESA, and says, in putting that  
24     provision in, Congress recognized Puerto Rico's mixed  
25     sovereign status, and squarely put in this Court's

1 jurisdiction the ability to review and confirm the validity of  
2 Commonwealth law. And notes that the entirety of PROMESA has  
3 passed in connection and in conjunction with the Territories  
4 Clause. And I think that completely undermines the idea that  
5 there's nothing inconsistent about the position they're taking  
6 now and the position they took then.

7 Thank you, Your Honor.

8 THE COURT: Thank you, Mr. Friedman.

9 And, Mr. Bienenstock, we have you allocated for 11  
10 minutes.

11 MR. BIENENSTOCK: Thank you, Your Honor.

12 I was heartened by the number of things Ambac is not  
13 contesting. We explained that whether a law is a local law  
14 depends on whose debt is being dealt with. It's Puerto Rico's  
15 debt and its instrumentalities. Whose property? It's their  
16 property. Not what creditors -- where creditors are on any  
17 night all around the world, because it makes no sense that you  
18 can go from a local to a national to an international statute  
19 based on where the creditors holding debt happened to be.

20 And there was no answer to the fact that in *Binns*,  
21 the tax was imposed on anyone all around the world who owned a  
22 business needing a license in the territory of Alaska at that  
23 time.

24 THE COURT: I recognize -- but I heard her argue  
25 quite forcefully about national economic effects and effects

1 on markets in arguing for uniformity. So, you know, that may  
2 have been an indirect way of responding. I'll have to reflect  
3 on all of this more thoroughly of course.

4 MR. BIENENSTOCK: Right. And in response to that,  
5 Your Honor, there is -- every transaction in commerce is going  
6 to affect supply and demand, which ultimately affects  
7 everything else. We think that's a -- that argument has never  
8 been picked up by federal jurisprudence, as to what makes a  
9 statute local or national.

10 In terms of the argument that Chapter Nine is  
11 national, yes, because it applies across the United States to  
12 every municipality and governmental unit, other than the  
13 states themselves. Title III is just the opposite. It  
14 applies to only territories, and according to Ambac, only one  
15 territory, Puerto Rico.

16 Now, in terms of a key assertion that we explained in  
17 our briefs and in argument this morning, that Congress can  
18 pass local laws using what power the state would have, in this  
19 case, the Puerto Rico territorial government and Congress'  
20 general powers. And to support that, we took the language  
21 from the *American Insurance* case which said, in legislating  
22 for them, Congress exercises the combined powers of the  
23 general and of the state government. And that language was  
24 picked up and endorsed yet again in *Northern Pipeline*, as I  
25 explained earlier.

1                   Ambac has no answer. They simply flip back to the  
2 party line: No, the state government can't do it; it can't be  
3 local. And that's just contrary to the law. Then what they  
4 say is they tie that to the Supreme Court's decision striking  
5 down or affirming the First Circuit, which struck down the  
6 Debt Enforcement Act in Puerto Rico.

7                   That is not a viable argument for Ambac. And the  
8 reason is that Justice Thomas begins the Supreme Court's  
9 decision in that case with a paragraph that says, basically,  
10 the issue is whether the Federal Bankruptcy Code preempts  
11 state bankruptcy laws that enable insolvent municipalities to  
12 restructure their debts over the objections of creditors, and  
13 instead requires municipalities to restructure such debts  
14 under Chapter Nine of the Bankruptcy Code. And Justice Thomas  
15 cites 11 U.S.C. 903(1), which is the statute that the Supreme  
16 Court said prohibited Puerto Rico from passing its own  
17 statute.

18                   Clearly, Ambac cannot have a meritorious argument in  
19 saying Congress can't use its own power, because it passed a  
20 statute that denied other states or territories of that power.  
21 If Congress -- Congress can enact that statute and can repeal  
22 that statute. So Ambac is basically arguing that Congress  
23 disqualified itself from being able to pass Title III by  
24 telling other jurisdictions they can't do it. Well, Congress  
25 doesn't have to disqualify itself, and clearly that was not

1      its intention. It's completely counter productive.

2                  As far as the functional test, Your Honor, as Ambac  
3 admitted this morning, the functional test comes out of the  
4 *Boumediene* case that it cites, and the *Boumediene* case  
5 explicitly, explicitly relies on the Insular Cases, which are  
6 exactly the cases the Oversight Board and all of the other  
7 parties in support of the Motion to Dismiss disavowed relying  
8 on. And it's interesting, because Ambac accuses us in its  
9 brief of relying on the Insular Cases, which we expressly  
10 disclaimed, and then it relies on *Boumediene*.

11                But the second point on the functional test is, you  
12 know, Ambac said again this morning, so what's so bad about  
13 applying the Uniformity Clause, you know, great for commerce,  
14 great for this, great for that. And that's the problem with  
15 the functional test: Anything you like you say applies.

16                Well, different people will have different opinions  
17 as to whether it's actually beneficial to the United States of  
18 America and its territories to impose on territories the same  
19 laws you imposed on other municipalities. At the very  
20 minimum, that's debatable. And that's the problem with the  
21 functional test. It comes out whichever way you want it to  
22 come out, depending on your point of view. So there's no  
23 objectivity, no test, nothing that could lead nine courts out  
24 of ten, or even seven out of ten, to come out the same way,  
25 because it's all subject to whether -- what policies you

1 believe should be furthered and what policies are hindered.

2 In terms of Ambac's arguments that there was this  
3 growing recognition of the meaning of PROMESA, and the  
4 Oversight Board's increasing, I guess in their view, more  
5 extreme powers -- I mean, the uniformity question cannot be  
6 decided based on Ambac's private beliefs or its  
7 characterizations of what it thinks the Oversight Board was  
8 doing. There was no answer whatsoever to the fact that  
9 PROMESA doesn't have any priority provision that changes the  
10 priority of Ambac's claims from what they would be in Chapter  
11 9 or Chapter 11. As I said earlier, Title III incorporates  
12 the exact same, identical, unfair discrimination statute as  
13 applies in Chapter 9 and Chapter 11.

14 Instead of answering on the merits, Ambac just lapses  
15 back to its overarching descriptions of its mindset, which is  
16 it thinks that we're going overboard or some such thing. But  
17 that's not law. That's just ranting against something they  
18 don't like.

19 And as far as feeling that their property interests  
20 are treated differently, and that's why we need a --  
21 uniformity in position, let's look at the record. They  
22 asserted rights under Bankruptcy Code Section 928. This Court  
23 and the First Circuit rejected their contentions. They  
24 applied for cert to the Supreme Court, and it was denied. It  
25 wasn't a matter of Title III changing their property rights.

1   || It was the fact that they didn't have the rights they thought  
2   || they had.

3 (Sound played.)

4 MR. BIENENSTOCK: And they were governed by the same  
5 provisions as would be in the other chapters.

6 In the -- as far as their argument that the holistic  
7 approach is what's different in Title III, the First Circuit  
8 and this Court have said in the decisions on the 926 Trustee  
9 issues that they were taking from Chapter Nine cases the  
10 holistic approach. So Ambac has stepped into a trap it made  
11 by itself. It says the holistic approach makes it nonuniform.  
12 That was taken from the chapters that they say should apply  
13 here. And they're just a hundred percent wrong in their  
14 assertions.

23 Ambac has no answer for that. They just repeat the  
24 argument they started with, that they don't like 106(e), and  
25 they don't like the fact that 314(b)(7) says the plan of

1 adjustment needs to be consistent with the fiscal plan. All  
2 the Board gets to do there is say how much debt it believes  
3 can be sustained by the reorganized debtor. And, frankly, if  
4 any debtor ever got up before Your Honor and said, Your Honor,  
5 I don't think I can carry more than X debt --

6 (Sound played.)

7 MR. BIENENSTOCK: -- I respectfully submit, Your  
8 Honor would not believe that plan is feasible if its proponent  
9 is saying, I can't afford it. And that's all 314(b)(7) does.

10 I guess my time has run out, so subject to any of the  
11 Court's questions, I'm concluded, Your Honor.

12 THE COURT: Thank you, Mr. Bienenstock. I don't have  
13 further questions for you. And so I thank you and all of the  
14 counsel who've presented excellent, clear arguments that give  
15 the Court much more food for thought, in addition to the  
16 extensive briefing that has been filed.

17 I take this motion under advisement, and this  
18 concludes today's hearing. I would like to note, for  
19 everyone's benefit, that there have been some inaccurate press  
20 reports that there is a hearing scheduled for February 10th.  
21 So please be aware, and I ask any press representatives who  
22 may be listening in to note that no hearing has been scheduled  
23 for February 10th. That is a submission deadline. That is  
24 not a hearing date.

25 The next scheduled hearing is the hearing concerning

1      Omnibus Claim Objections, which will be held on January 14th,  
2      this Thursday, beginning at 9:30 AM Atlantic Standard Time,  
3      which is 8:30 AM Eastern Standard Time, with the usual  
4      telephone observation units. There is a procedures order on  
5      file.

6              As always, I want to thank the marvelous court staff  
7      in Puerto Rico, Boston, and New York. They do constant,  
8      effective, efficient work in preparing for and in supporting  
9      the conduct of these hearings, and all of the administration  
10     of these cases. So thank you to the staff, as well as to  
11     counsel who argued today. That concludes my remarks.

12              I urge everyone to stay safe and keep well. And get  
13     a vaccine as soon as you're eligible. Take care, everyone.  
14     Thank you.

15              (Proceedings concluded.)

16              \* \* \*

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1 U.S. DISTRICT COURT )

2 DISTRICT OF PUERTO RICO)

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4 I certify that this transcript consisting of 98 pages is  
5 a true and accurate transcription to the best of my ability of  
6 the proceedings in this case before the Honorable United  
7 States District Court Judge Laura Taylor Swain on January  
8 12, 2021.

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12 S/ Amy Walker

13 Amy Walker, CSR 3799

14 Official Court Reporter

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